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In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA, PETITIONER

v.

ONE ASSORTMENT OF 89 FIREARMS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Whether a prior acquittal on criminal charges involving firearms precludes a subsequent in rem forfeiture proceeding against the firearms.

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The Solicitor General, on behalf of the United States, petitions for a writ or certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The en banc opinion of the court of appeals (App. A, *infra*, 1a-14a) is reported at 685 F.2d 913. The earlier panel opinion (App. B, *infra*, 15a-29a) is reported at 669 F.2d 206. The opinion of the district court (App. D, *infra*, 31a-44a) is reported at 511 F. Supp. 133. An earlier opinion of the district court (App. E, *infra*, 45a-55a) is reported at 463 F. Supp. 365.

JURISDICTION

The judgment of the court of appeals (App. C, *infra*, 30a) was entered on August 23, 1982. On November 12, 1982, the Chief Justice extended the time in which to file a petition for a writ of certiorari to and including December 21, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 924(d) of Title 18 provides:

> Any firearms or ammunition involved in or used or intended to be used in, any violation of the provisions of this chapter or any rule or regulation promulgated thereunder, or any violation of any other criminal law of the United States, shall be subject to seizure and forfeiture and all provisions of the Internal Revenue Code of 1954 relating to the seizure, forfeiture, and disposition of firearms, as defined in section 5845(a) of that Code, shall, so far as applicable, extend to seizures and forfeitures under the provisions of this chapter.

STATEMENT

1. On March 31, 1977, the United States commenced an in rem civil action in the United States District Court for the District of South Carolina seeking forfeiture to the United States of an assortment of firearms seized on January 20, 1977, by Special Agents of the Bureau of Alcohol, Tobacco and Firearms. The complaint alleged that the firearms had been used and possessed on January 20, 1977, and prior thereto by Patrick M. Mulcahey while he was engaged in the business of dealing in firearms without a license, in violation of 18 U.S.C.

922(a)(1) and 923(a). Forfeiture was sought pursuant to 18 U.S.C. 924(d).[1]

Mulcahey filed a claim for recovery of the firearms and also filed an answer to the forfeiture complaint. In his answer, Mulcahey raised collateral estoppel and res judicata as a bar to the forfeiture. Mulcahey had previously been tried and acquitted of charges that he had been engaged in the business of dealing in firearms without being licensed, in violation of 18 U.S.C. 922(a)(1) and 924(a). *United States* v. *Mulcahey*, No. 77-00013 (D.S.C. Mar. 16, 1977) (App. A, *infra*, 2a). At the criminal trial, the government's evidence showed that Mulcahey had not been issued a license to deal in firearms for the period of July 1, 1975, to March 31, 1977, but that he nevertheless bought and sold firearms on numerous occasions during this period (App. D, *infra*, 33a-35a). Mulcahey testified in his own defense, admitting that he had no license (Tr. 247)[2] and that he had bought and sold firearms during the period set forth in the indictment (Tr. 247-279). He claimed, however, that he had been entrapped into making the illegal firearms transactions (see, e.g., Tr. 248-249, 257-263, 273). The trial court thereafter submitted the entrapment defense to the jury (Tr. 294-296). The jury returned a general verdict of not guilty.

On motion of the government in the forfeiture proceeding, the district court struck Mulcahey's col-

[1] The number of firearms involved in this action has varied somewhat with time. See App. E, *infra*, 45a. The original complaint listed an assortment of 92 firearms but was subsequently amended to include an additional automatic pistol, bringing the total to 93. Four of these guns were returned to Mulcahey's wife, leaving 89 guns as the subject of the forfeiture proceeding (App. D, *infra*, 36a).

[2] "Tr." refers to the transcript of the criminal trial.

lateral estoppel and res judicata defenses (App. E, *infra*, 45a-51a). The parties had previously stipulated that the transcript of the prior criminal trial would be submitted to the court in lieu of live testimony (App. A, *infra*, 2a). In its findings of fact, the court found that Mulcahey had no federal firearms dealer's license and that he did indeed sell and purchase numerous firearms and ammunition, including multiple purchases on several occasions of the same type of firearms (App. D, *infra*, 33a, 39a). The court held that a forfeiture proceeding under 18 U.S.C. 924(d) is remedial in nature and is properly characterized as a civil proceeding (App. D, *infra*, 37a). The court concluded that the government had proved by a preponderance of the evidence that Mulcahey was engaged in the business of dealing in firearms and ammunition without the required federal license (*ibid.*). The firearms used or intended to be used in violation of 18 U.S.C. 922(a)(1) were therefore found to be subject to forfeiture under 18 U.S.C. 924(d) (App. D, *infra*, 37a-44a).[3]

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[3] The court concluded (App. D, *infra*, 42a-43a):

> In the instant case, although the claimant did not display his entire assortment of firearms, he did maintain them all in his residence, from which he also operated an army surplus business. The fact that the claimant kept the entire assortment of firearms so accessible to his surplus showroom, that he repeatedly went into the non-public area of his residence to obtain the firearms he did display to the government agents, the claimant's own statements, his course of dealing, and the wealth of circumstantial evidence in the record prove by a preponderance of the evidence that he used or intended to use all of the firearms he personally possessed as an inventory to be drawn from in the course of dealing in firearms, in violation of 18 U.S.C. § 922(a)(1).

2. A divided panel of the court of appeals reversed (App. B, *infra*, 15a-29a). Relying on *Coffey* v. *United States*, 116 U.S. 436 (1886), the panel held that the forfeiture action was barred by Mulcahey's criminal acquittal because the criminal action involved "the identical facts" of the forfeiture proceeding and the "essential elements" of the forfeiture action had therefore been resolved against the government (App. B, *infra*, 22a).

Chief Judge Winter dissented (App. B, *infra*, 23a-29a). He concluded (*id.* at 23a) that while "*Coffey* holds that a subsequent *criminal* forfeiture is barred by an earlier acquittal on criminal charges arising out of the same facts," more recent Supreme Court decisions "compel the conclusion that the forfeiture in the present case is civil." A subsequent civil action, Judge Winter reasoned, is not barred by a criminal acquittal "because the standards of proof in criminal and civil proceedings are different" (*ibid.*). Relying on *Helvering* v. *Mitchell*, 303 U.S 391 (1938), *Murphy* v. *United States*, 272 U.S. 630 (1926), and *Stone* v. *United States*, 167 U.S. 178 (1897), Judge Winter concluded that "if the forfeiture proceeding is civil in nature," res judicata does not bar the civil action, and "the standard of proof argument, by itself, is enough to defeat any resort to collateral estoppel" (App. B, *infra*, 24a). Judge Winter noted that the rationale adopted by the majority was rejected in *One Lot Emerald Cut Stones* v. *United States*, 409 U.S. 232 (1972), because the forfeiture provision at issue in that case was found to be civil in nature. He contended that similar reasoning controlled in this case. "The forfeiture statute here, 18 U.S.C. § 924(d), was manifestly designed to aid in the enforcement of gun

control laws by preventing the circulation of firearms which had been illegally obtained. *One Lot* thus compels the conclusion that the forfeiture at issue here is civil in nature, so that the double jeopardy and res judicata claims must be rejected. It matters not, despite the majority's views, that the necessary allegations in the criminal proceeding and the forfeiture proceeding were identical" (App. B, *infra*, at 27a, footnote omitted).

3. On rehearing en banc the court of appeals adhered to the panel decision by a 5-4 vote (App. A, *infra*, 1a-4a). The majority again specifically relied on *Coffey* v. *United States*, *supra*, and rejected the government's argument that a prior criminal acquittal does not bar a subsequent forfeiture proceeding (App. A, *infra*, 3a-5a). It concluded that the sanction at issue here is criminal in nature, relying on the fact that the forfeiture provision is contained in 18 U.S.C. (& Supp. IV) 924 and "[e]verything in § 924 provides a penalty, be it fine, prison or forfeiture, for the violation of a provision of the Gun Control Act" (App. A, *infra*, 9a-10a). The court distinguished *Helvering* v. *Mitchell*, *supra*, and other Supreme Court precedent providing for civil penalties subsequent to a criminal acquittal on the ground that "[t]here is nothing remedial about forfeiture under § 924(d)" (App. A, *infra*, 10a).

Judge Winter, joined by three others, again dissented. Relying in part on the reasoning of his dissent at the panel stage, he further noted that the "majority errs when it confidently asserts that the jury verdict in the criminal action conclusively settled the issue that Mulcahey was not engaged in the business of dealing in firearms without a license" (App. A, *infra*, 13a). Because of Mulcahey's asser-

tion of entrapment, "it is equally possible that the jury found that Mulcahey was engaged in the business of dealing in firearms without a license, but had been entrapped into committing an illegal sale, as [that it] found that Mulcahey was not so engaged" (*ibid.*). Judge Winter also remained convinced "that the forfeiture provisions of 18 U.S.C. 924(d) are civil in nature so that *any* determination in the criminal prosecution is irrelevant to a decision of forfeiture" (App. A, *infra*, 13a; emphasis in original). This conclusion is reinforced, Judge Winter reasoned, by the fact that the forfeiture provision is significantly broader in scope than the criminal sanctions (*id.* at 13a-14a). The forfeiture provision provides "disjunctively that '[a]ny firearm involved in or used or *intended to be used* in, any violation of this chapter * * * shall be subject to seizure and forfeiture * * *' (emphasis added). [18 U.S.C. 924(d)]. Nothing in the provision of § 922 under which Mulcahey was prosecuted renders an *intention* to engage in the business of dealing in firearms without a license illegal" (App. A, *infra*, 13a-14a; footnote omitted).

REASONS FOR GRANTING THE PETITION

Section 924(d) of Title 18 of the United States Code provides for the seizure and forfeiture of "[a]ny firearm or ammunition involved in or used or intended to be used in, any violation of [federal gun control law]." Relying solely on *Coffey* v. *United States*, 116 U.S. 436 (1886), the court of appeals ruled that an acquittal on criminal charges bars a subsequent forfeiture action under 18 U.S.C. 924(d), notwithstanding the fact that forfeiture actions under Section 924(d) have traditionally been subject to the preponderance of evidence standard of

proof rather than the much stricter criminal standard. Although the doctrinal basis for its preclusion rule is unclear, the lower court's decision rests on the premise that "[t]he criminal verdict conclusively decided that the firearms * * * were not 'involved in or used or intended to be used in the violation'" of federal law (App. A, *infra*, 8a). This factual resolution, the court concluded, is binding on all subsequent judicial proceedings involving the firearms and bars the forfeiture action here.

The premise and conclusion of the court of appeals conflict with controlling legal precedent and are faulty as a matter of logic. An acquittal, of course, establishes only that the government has not shown beyond a reasonable doubt that certain facts exist; it does not "conclusively" establish that those facts do not exist. The decisions of this Court, therefore, clearly hold that a criminal acquittal does not bar a subsequent "civil action requiring a different degree of proof." *Helvering* v. *Mitchell*, 303 U.S. 391, 405 (1938). The court of appeals, in apparent recognition of this rule, concluded that a forfeiture under 18 U.S.C. 924(d) is neither "civil" (App. A, *infra*, 12a) nor "remedial" (*id.* at 10a). This conclusion, however, conflicts with the decisions of numerous other circuits that have held that 18 U.S.C. 924(d) embodies a remedial, civil penalty. See, e.g., *Glup* v. *United States*, 523 F.2d 557, 561 (8th Cir. 1975).

The en banc decision of the court of appeals raises issues that merit the attention of this Court. The lower court has disregarded controlling decisions of this Court and, by attaching a "criminal" label to this forfeiture action, has rendered an opinion in direct conflict with every other court of appeals that

has addressed the question whether 18 U.S.C. 924(d) embodies a civil or a criminal sanction.

1. The decision of the en banc court below rests squarely upon a single aged precedent—*Coffey* v. *United States*, *supra*. *Coffey*, however, is a slender reed upon which to hang the entire weight of this decision. Indeed, more recent opinions of this Court raise the question whether the "rule" of the *Coffey* case retains any independent vitality.

The Court in *Coffey* held that a forfeiture action brought against certain distilling equipment was barred by the owner's prior acquittal on charges of removing and concealing distilled spirits with the intent to defraud the revenue.[4] The Court reasoned that "where an issue raised as to the existence of the act or fact denounced has been tried in a criminal proceeding, instituted by the United States, and a judgment of acquittal has been rendered in favor of a particular person, that judgment is conclusive in favor of such person, on subsequent trial of a suit *in rem* by the United States, where, as against him, the existence of the same act or fact is the matter in issue, as a cause for the forfeiture of the property prosecuted in such suit *in rem*" (116 U.S. at 443). The Court noted and rejected the argument that the criminal acquittal should not bar the in rem action because the acquittal "may have taken place because of the rule requiring guilt to be proved beyond a reasonable doubt, and that, on the same evidence, on the question of preponderance of proof, there might be a

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[4] The statute at issue in *Coffey* provided that whenever any person engaged in the distilling business "defrauds * * * the United States of the tax on the spirits distilled by him * * * he shall forfeit the distillery and distilling apparatus * * * and shall be fined * * * and be imprisoned" (116 U.S. at 437).

verdict for the United States * * *" (*ibid.*). The Court concluded that differing standards of proof between a criminal and a forfeiture action do not prevent preclusion because "the fact or act has been put in issue and determined against the United States; and all that is imposed by the statute, as a consequence of guilt, is a punishment therefor. There could be no new trial of the criminal prosecution after the acquittal in it; and a subsequent trial of the civil suit amounts to substantially the same thing, with a difference only in the consequences following a judgment adverse to the claimant" (*ibid.*).

The *Coffey* decision has remained something of an enigma, because the Court did not specify the legal foundation for the preclusion rule announced by the case. Was the forfeiture action barred by res judicata? Collateral estoppel? Double jeopardy? Subsequent courts and commentators have been uncertain. See generally 1B J. Moore & T. Currier, *Moore's Federal Practice* ¶ 418[3] (2d ed. 1982). See also *United States* v. *One Dodge Sedan*, 113 F.2d 552 (3d Cir. 1940) (collecting cases and law review articles criticizing *Coffey*). Whatever the original foundation for the *Coffey* rule, however, later decisions of this Court have given it an extremely narrow scope. See *Helvering* v. *Mitchell*, 303 U.S. 391, 405-406 (1938); *Murphy* v. *United States*, 272 U.S. 630, 631-632 (1926); *Stone* v. *United States*, 167 U.S. 178, 186-187 (1897).

In *Helvering*, the Court was faced with an action to recover a substantial monetary penalty for fraudulent avoidance of income tax. The defendant argued that his prior acquittal on charges of willfully attempting to evade and defeat the tax precluded the subsequent penalty action. The court of appeals, relying principally on *Coffey*, agreed and held that the

penalty action was precluded (see 303 U.S. at 396). The Court, in an opinion by Justice Brandeis, reversed.

The defendant in *Helvering* advanced three basic arguments: (1) that the second penalty action was barred by "res judicata" (apparently used in a broad sense as including collateral estoppel, see 303 U.S. at 397); (2) that the penalty action was barred by the Double Jeopardy Clause (*id.* at 398); and (3) that the *Coffey* decision required preclusion (*id.* at 405). The Court rejected each argument.

The res judicata and collateral estoppel arguments were quickly dispatched by the *Helvering* Court. The Court simply reversed the position taken in *Coffey* and concluded that differences between the burden of proof in criminal and civil actions do prevent application of res judicata or collateral estoppel to civil suits brought after a criminal acquittal. Compare 116 U.S. at 443 with 303 U.S. at 397. See also *United States* v. *$2,500 in United States Currency*, 689 F.2d 10, 15 (2d Cir. 1982) (*Helvering* "reject[s] the holding of *Coffey*"). "The difference in degree of the burden of proof in criminal and civil cases precludes application of the doctrine of *res judicata*. The acquittal was 'merely * * * an adjudication that the proof was not sufficient to overcome all reasonable doubt of the guilt of the accused.' * * * That acquittal on a criminal charge is not a bar to a civil action by the Government, remedial in its nature, arising out of the same facts on which the criminal proceeding was based has long been settled." *Helvering* v. *Mitchell*, *supra*, 303 U.S. at 397. See also *One Lot Emerald Cut Stones* v. *United States*, 409 U.S. 232, 235 (1972) ("difference[s] in the burden of proof in criminal and civil cases precludes application of the doctrine of collateral estoppel"); *Murphy* v. *United States*, *supra*, 272

U.S. at 632-633; *Stone* v. *United States*, *supra*, 167 U.S. at 188.

The *Helvering* Court similarly rejected the defendant's double jeopardy argument on the ground that the second penalty action was civil, not criminal in nature. "Congress may impose both a criminal and a civil sanction in respect to the same act or omission * * *. The question for decision is thus whether [the second action] imposes a criminal sanction." 303 U.S. at 399. The Court held that "[f]orfeiture of goods or their value or the payment of fixed or variable sums of money" are civil sanctions because they have historically been "enforcible by civil proceedings" (*id.* at 400).

Finally, the Court rejected the notion that *Coffey* mandated preclusion of the second suit. The Court stated flatly that "the rule of the *Coffey* case '[does] not apply to a situation where there ha[s] been an acquittal on a criminal charge followed by a civil action requiring a different degree of proof' " (303 U.S. at 405). Therefore, as Judge Winter correctly noted in his original dissent to the panel opinion, *Coffey* bars only a "subsequent criminal forfeiture * * * arising out of the same facts" as an earlier criminal acquittal (App. B, *infra*, 23a). This is the sole aspect of the *Coffey* decision that has any continuing vitality today. One need not, moreover, reach as far back as *Coffey* for an expression of this rule. See, e.g., *Ashe* v. *Swenson*, 397 U.S. 436, 445-447 (1970). Thus, the crucial question in this case is not, as the court of appeals apparently believed, whether *Coffey* mandates preclusion, but rather whether 18 U.S.C. 924(d) provides a civil or criminal penalty. The court of appeals erred in concluding that 18 U.S.C. 924(d) embodies a criminal sanction.

2. The lower court's ruling that 18 U.S.C. 924(d) provides a criminal sanction does not comport with this Court's decision in *United States* v. *Ward*, 448 U.S. 242 (1980), nor with the teachings of *Helvering* v. *Mitchell*, *supra*, and *One Lot Emerald Cut Stones* v. *United States*, *supra*. Those decisions persuasively demonstrate that a forfeiture action under 18 U.S.C. 924(d) is not precluded by a prior criminal acquittal because the statute provides a penalty that is civil and remedial in nature.

Based on two rather limited considerations, the court below concluded that 18 U.S.C. 924(d) is neither "civil" nor "remedial." The court reasoned that 18 U.S.C. 924(d) is not "civil" because it "is a part of the 'Penalties' section of the law" (App. A, *infra*, 9a). It next concluded that there is nothing "remedial" about the statute because following forfeiture the "firearms are destroyed" (*id.* at 10a). See 26 U.S.C. 5872(b). This perfunctory analysis is plainly insufficient. The fact that forfeiture is listed as a "penalty" is not, of course, determinative of whether it is a civil or a criminal penalty. Moreover, the fact that forfeited firearms are destroyed rather than resold does not negate the remedial congressional purpose behind the forfeiture itself. A more balanced and careful analysis leads to a result directly opposite to the one reached by the court of appeals.

"This Court has often stated that the question whether a particular statutorily-defined penalty is civil or criminal is a matter of statutory construction." *United States* v. *Ward*, *supra*, 448 U.S. at 248. See also *One Lot Emerald Cut Stones*, *supra*, 409 U.S. at 237; *Helvering*, *supra*, 303 U.S. at 399. The Court's inquiry in this regard has "traditionally proceeded on two levels." *United States* v. *Ward*, *supra*, 448 U.S. at 248. First, the Court has sought to

determine whether Congress "indicated either expressly or impliedly a preference for one label or the other" (*ibid.*). Second, where Congress has indicated its intention to establish a civil penalty, the Court has inquired "whether the statutory scheme was so punitive either in purpose or effect as to negate that intention" (*id.* at 249). This analysis clearly indicates the civil nature of the forfeiture provision at issue here.

Section 924(d) does not prescribe the procedures to be followed in effectuating a forfeiture, but rather incorporates by reference the procedures of the Internal Revenue Code. This fact alone strongly indicates Congress' intention to establish Section 924(d) as a civil rather than a criminal penalty. Forfeitures "have been recognized as enforcible by civil proceedings since the original revenue law of 1789." *Helvering*, 303 U.S. at 400. The Internal Revenue Code provides that proceedings to enforce forfeitures "shall be in the nature of a proceeding in rem in the United States District Court for the district where such seizure is made" (26 U.S.C. 7323). In rem actions are, by their very nature, civil proceedings, with jurisdiction dependent upon seizures of a physical object, in contrast to the in personam nature of criminal actions. See *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 684 (1974). In addition to the in rem nature of the action, the Internal Revenue Code provides a summary, administrative proceeding for forfeiture of seized goods valued at $2,500 or less. See 26 U.S.C. 7325 (requiring the filing of a claim and posting of a bond in order to obtain judicial proceedings regarding forfeiture of goods valued at less than $2,500). Notice of the seizure may also be provided by publication. 26 U.S.C. (& Supp. IV) 6325.

Such procedures plainly could not be utilized in a criminal action.[5] "That Congress provided a distinctly civil procedure for [forfeitures under 18 U.S.C. 924(d)] indicates clearly that it intended a civil, not a criminal sanction." *Helvering, supra*, 303 U.S. at 402.

The fact that civil rather than criminal procedures apply to a Section 924(d) forfeiture is not the only evidence that the sanction cannot be deemed a criminal penalty. The legislative intent behind Section 924(d) demonstrates a broadly remedial purpose for the sanction. The forfeiture provided by Section 924(d) is not merely punitive; it is designed to prevent the circulation of firearms that have been illegally obtained. As the Second Circuit stated, the statute is designed "to keep potentially dangerous weapons out of the hands of unlicensed dealers." *United States* v. *16,179 Moslo Italian .22 Caliber Winlee Derringer Convertible Starter Guns*, 443 F.2d 463, 466 (2d Cir.), cert. denied, 404 U.S. 983

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[5] In line with the civil procedural rules governing forfeitures under 18 U.S.C. 924(d), courts have concluded that the government need establish its case only by a preponderance of the evidence. *United States* v. *86 Firearms*, 623 F.2d 643, 644 (10th Cir. 1980). One district court has even concluded that once the government has shown probable cause to justify a forfeiture, the burden of proof shifts to the defendant. *United States* v. *26 Firearms*, 485 F. Supp. 549 (W.D. Pa. 1980), aff'd, 639 F.2d 777 (3d Cir. 1980). Courts have regularly granted summary judgment in favor of the government (e.g., *United States* v. *Various Firearms*, 523 F.2d 47, 48 (7th Cir. 1975)) and routinely permit the government to appeal from an adverse decision in a forfeiture case—something that would be impermissible if the forfeiture action were "criminal." See, e.g., *United States* v. *Walters*, 638 F.2d 947 (6th Cir. 1981); *United States* v. *Seven Firearms*, 632 F.2d 1276 (5th Cir. 1980).

(1971).[6] See also *Lewis* v. *United States*, 445 U.S. 55, 66 (1980). And, as noted by Judge Winter in dissent (App. A, *infra*, 14a), the scope of Section 924(d) is much broader than the criminal provisions of 18 U.S.C. 922(a)(1). Section 922(a)(1) outlaws only the completed act of engaging in the business of dealing in firearms without a license. The forfeiture sanction, by contrast, reaches firearms that are merely "intended to be used" in violation of the law. Section 924(d), therefore, is clearly a remedial sanction, broader in scope than the separate criminal provisions of the gun control act, included by Congress as an integral part of a "carefully constructed package of gun control legislation." *Scarborough* v. *United States*, 431 U.S. 563, 570 (1977); *United States* v. *Batchelder*, 442 U.S. 114, 120 (1979).

The procedures prescribed by Congress for executing the forfeiture and the congressional purpose behind the sanction all evidence Congress' intent that 18 U.S.C. 924(d) be classified as a civil rather than a criminal penalty. The sanction, moreover, is not "so punitive either in purpose or effect as to negate that intention" (*United States* v. *Ward*, *supra*, 448 U.S. at 249). We recognize that a forfeiture proceeding is frequently labeled quasi-criminal because its object, like that of a criminal prosecution, is to penalize through the civil process the commission of an offense against the law. *One 1958 Plymouth Sedan* v. *Pennsylvania*, 380 U.S. 693, 700 (1965), citing *Boyd* v. *United States*, 116 U.S. 616, 633-634 (1886). But, as this Court recently explained, a forfeiture

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[6] Thus, rather than evidencing a punitive intent, as the court below apparently concluded (App. A, *infra*, 10a), the fact that forfeited firearms are destroyed furthers the broad remedial purposes of federal gun control legislation. See 26 U.S.C. 5872(b).

proceeding is not " 'so far criminal in [its] nature' " as to engage all the "procedural guarantees normally associated with criminal prosecutions" (*United States* v. *Ward*, *supra*, 448 U.S. at 251-255, quoting *Hepner* v. *United States*, 213 U.S. 103, 112 (1909)). The sanction in this case is no more criminal than the forfeiture at issue in *One Lot Emerald Cut Stones* (see 409 U.S. at 232) or the stiff monetary penalty involved in *Helvering* (see 303 U.S. at 400). The court below therefore erred in applying the preclusion rule announced in *Coffey*, inasmuch as that rule has no application except to criminal sanctions sought after a criminal acquittal. *Helvering*, *supra*, 303 U.S. at 405; *Ashe* v. *Swenson*, *supra*, 397 U.S. at 445-447.[7]

3. The decision below not only disregards controlling Supreme Court precedent, it also conflicts with the conclusion of six other circuits that 18 U.S.C. 924(d) embodies a civil sanction. *United States* v. *16,175 Moslo Italian .22 Caliber Winlee Derringer Convertible Starter Guns*, *supra*, 443 F.2d at 466; *United States* v. *Seven Firearms*, 632 F.2d 1276, 1278 (5th Cir. 1980); *United States* v. *Walters*, *supra*, 638 F.2d at 950; *United States* v. *Various Firearms*, 523 F.2d 47, 48 (7th Cir. 1975); *Glup* v. *United States*, *supra*, 523 F.2d at 561; *United States* v. *86 Firearms*, 623 F.2d 643, 644 (10th Cir. 1980). As the Eighth Circuit stated in *Glup*: "It is well established that a forfeiture proceeding under 18 U.S.C. 924(d) is remedial in nature and is properly

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[7] While the court below did not purport to rest its decision on double jeopardy grounds, we note that this Court has held that a forfeiture action may be brought following a criminal conviction, indicating that double jeopardy concerns are not the foundation for the *Coffey* rule. See *Various Items of Personal Property* v. *United States*, 282 U.S. 577 (1931). See also *United States* v. *Ward*, *supra*, 448 U.S. at 253.

characterized as a civil proceeding" (523 F.2d at 561). Thus, that court concluded that a forfeiture action under Section 924(d) would not be barred by a prior criminal acquittal (523 F.2d at 561). At least one district court has likewise held that a forfeiture under 18 U.S.C. 924(d) may follow an acquittal on related criminal gun control charges. *United States* v. *One Assortment of 12 Rifles and 21 Handguns*, 313 F. Supp. 641, 642 (N.D. Fla. 1970).

The decision of the court of appeals necessarily rests on the erroneous conclusion that an ostensibly civil forfeiture penalty is in reality a criminal sanction. Forfeitures, however, have long been recognized by this Court as enforcible by civil proceedings. "In spite of their comparative severity, such sanctions have been upheld against the contention that they are essentially criminal and subject to the procedural rules governing criminal prosecutions." *Helvering*, *supra*, 303 U.S. at 400. See also *United States* v. *Regan*, 232 U.S. 37 (1914) (tracing the civil nature of forfeitures back to the earliest days of this country). Review by this Court is warranted in order to preserve the clarity that this area of the law requires.[8]

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[8] Unless the error of the lower court is corrected, litigants in the Fourth Circuit and elsewhere will be unsure as to whether civil procedures still control forfeiture actions under 18 U.S.C. 924(d). See generally note 5, *supra*. Absent clarification by this Court, even *convicted* defendants may assert that a forfeiture action following conviction is barred by double jeopardy considerations. But see *Various Items of Personal Property* v. *United States*, 282 U.S. 577 (1931) (permitting forfeiture action following criminal conviction). It is even possible that the rationale of the court of appeals' decision would require application of the Federal Rules of

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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DECEMBER 1982

Criminal Procedure to all forfeiture proceedings based on a violation of federal criminal law. See, e.g., Fed. R. Crim. P. 7(c)(2), 31(e), 32(b)(2) (specifying procedural requirements for "criminal" forfeitures).

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 81-1055

UNITED STATES OF AMERICA, APPELLEE

v.

ONE ASSORTMENT OF FIREARMS, APPELLANT

NATIONAL RIFLE ASSOCIATION OF AMERICA,
AMICUS CURIAE

Appeal from the United States District Court
for the District of South Carolina, at Columbia
Charles E. Simons, Jr., District Judge

Argued: June 8, 1982 Decided: August 23, 1982

Before WINTER, Chief Judge, BUTZNER, RUSSELL, HALL, PHILLIPS, MURNAGHAN, SPROUSE, ERVIN and CHAPMAN, Circuit Judges, sitting en banc.

CHAPMAN, Circuit Judge

This is an appeal from a judgment ordering forfeiture under 18 U.S.C. § 924(d) of 80 firearms seized from the home of Patrick Mulcahey, who was alleged to have been a dealer in firearms without a license. Mulcahey had previously been indicted for

unlawfully and knowingly engaging in the business of dealing in firearms without a license in violation of 18 U.S.C. § 922(a)(1). Finding that Mulcahey's acquittal on the criminal charge is a bar to the forfeiture, we reverse.

On January 20, 1977, an assortment[1] of firearms was seized by agents of the Bureau of Alcohol, Tobacco and Firearms. Following an indictment under 18 U.S.C. § 922(a)(1), Mulcahey was tried by a jury and on March 16, 1977 was acquitted of the charge. The present action *in rem* against the same assortment of firearms was initiated on March 31, 1977 by service of a complaint seeking forfeiture pursuant to 18 U.S.C. § 924(d). Mulcahey, as claimant, filed a claim for recovery of the firearms and also filed an answer to the complaint. The parties entered into a stipulation that the transcript in the criminal trial of *United States* v. *Mulcahey*, No. 77-00013, would be submitted to the court in lieu of testimony. Upon motion of the United States prior to trial, the district court struck Mulcahey's second defense of collateral estoppel, res judicata and the bar to the present proceedings of the jury verdict in No. 77-00013. Upon trial of the forfeiture the same firearms which had been seized by the ATF and used by the United States Attorney as evidence in the criminal action were again introduced into evidence. The district court ordered a forfeiture of 80 of the firearms. The court concluded:

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[1] The number of firearms in the assortment has varied from time to time as the agents of ATF and the United States returned certain firearms admittedly belonging to other persons and the district court in its final order directed that certain firearms be returned to owners other than Mulcahey.

> . . . [T]he firearms here in question were involved in, used and intended to be used in violation of 18 U.S.C. § 922(a)(1). Such firearms are rendered subject to forfeiture under 18 U.S.C. § 924(d), which forfeiture is hereby ordered.

The court found that these firearms were used by Mulcahey from May 13, 1976 to January 20, 1977, while Mulcahey was engaged in the business of dealing in firearms without being properly licensed. The criminal indictment against Mulcahey charged him with being engaged in the business of dealing in firearms without being licensed to do so from on or about May 12, 1976, up to the return of the indictment on January 19, 1977.

Mulcahey seeks return of the firearms upon the ground that the jury verdict in the criminal action conclusively settled the issue that he was not engaged in the business of dealing in firearms without a license, and he contends that the present action is barred by the holding in *Coffey* v. *United States*, 116 U.S. 436 (1886). We agree.

Coffey was tried on a criminal charge of violating the revenue laws of the United States by operating a distillery without payment of the required taxes. He was acquitted on this charge, and shortly thereafter the United States sought forfeiture of the distilling equipment. Coffey raised the prior acquittal as a bar to the forfeiture action, and the Supreme Court agreed, stating at page 442:

> The principal question is as to the effect of the indictment, trial, verdict and judgment of acquittal set up in the fourth paragraph of the answer. The information is founded on sections 3257, 3450 and 3453; and there is no question,

on the averments in the answer, that the fraudulent acts and attempts and intents to defraud, alleged in the prior criminal information, and covered by the verdict and judgment of acquittal, embraced all of the facts, attempts and intents averred in the information in this suit.

The question, therefore, is distinctly presented, whether such judgment of acquittal is a bar to this suit. We are of the opinion that it is.

At 443 the Court stated:

Yet, where an issue raised as to the existence of the act or fact denounced has been tried in a criminal proceeding, instituted by the United States, and a judgment of acquittal has been rendered in favor of a particular person, that judgment is conclusive in favor of such person, on subsequent trial of a suit *in rem* by the United States, where, as against him, the existence of the same act or fact is the matter in issue, as a cause for the forfeiture of the property prosecuted in such suit *in rem*. It is urged as a reason for not allowing such effect to the judgment, that the acquittal in the criminal case may have taken place because of the rule requiring guilt to be proved beyond a reasonable doubt; and that, on the same evidence, on the question of preponderance of proof, there might be a verdict for the United States, in the suit *in rem*. Nevertheless, the fact or act has been put in issue and determined against the United States; and all that is imposed by the statute, as a consequence of guilt, is a punishment therefor. There could be no new trial of the criminal prosecution after the acquittal in it; and a subsequent trial of the civil suit amounts to substantially the same thing,

with a difference only in the consequences following a judgment adverse to the claimant.

Coffey was acquitted on a charge of operating a still without paying the necessary tax thereon and could raise this acquittal as a bar to action for forfeiture of the distilling equipment. Mulcahey was acquitted on a charge of being engaged in the business of dealing in firearms without a license and can raise this acquittal as a bar to the present forfeiture action involving the 89 firearms, since a jury has already found that these 89 firearms were not being used by Mulcahey in the business of dealing in firearms without a license.

The government argues that the present action is controlled by *One Lot Emerald Cut Stones and One Ring* v. *United States*, 409 U.S. 232 (1972), in which the court held that forfeiture of the ring and stones was not barred by the owner's acquittal on charges of violating 18 U.S.C. § 545 which covers willfully and knowingly, with intent to defraud the United States, smuggling articles into the United States without submitting the same to required customs procedures. The court found that the second action was not barred because the essential elements of proof in the two actions were not the same. In the criminal action it was necessary to prove a knowing and willful intent to defraud the United States, which was not required in the forfeiture. The court was careful to point out that if the elements of proof were the same then the government would be barred. At page 234 the court stated:

> Collateral estoppel would bar a forfeiture under § 1497 if, in the earlier criminal proceeding, the elements of a § 1497 forfeiture had been resolved

against the government. *Ashe* v. *Swenson*, 397 U.S. 436, 443 (1970).

In Mulcahey's criminal proceeding the elements of the present forfeiture were all resolved against the government, so the present action is barred by collateral estoppel.

One Lot Emerald Cut Stones did not overrule *Coffey*. The court in *One Lot Emerald Cut Stones*, at footnote 5 distinguished the two cases as follows:

> The difference in the issues involved in the criminal proceeding, on the one hand, and the forfeiture action, on the other, serves to distinguish *Coffey* v. *United States*, 116 U.S. 436 (1886), relied upon by the District Court in the present case. *Coffey* involved a forfeiture action commenced after an acquittal. This Court noted, in holding the forfeiture barred, that "[t]he information [for forefeiture] is founded on §§ 3257, 3450 and 3453; and there is no question, on the averments in the answer, that the fraudulent acts and attempts and intents to defraud, alleged in the prior criminal information, and covered by the verdict and judgment of acquittal, embraced all of the acts, attempts and intents averred in the information in this suit." *Id.* at 442. The Court specifically distinguished the situation where "a certain intent must be proved to support the indictment, which need not be proved to support the civil action." *Id.* at 443. See also *Stone* v. *United States*, 167 U.S. 178 (1897).

The present case is not controlled by *One Lot Emerald Cut Stones*. The stones which were the subject of the forfeiture in that case became contraband and subject to seizure once they came into the United States

without payment of the required duty. The criminal action for alleged smuggling of these stones proved only that the holder of the stones did not knowingly with the intent to defraud the United States smuggle the articles into the country. Intent to defraud was not an issue in the later forfeiture proceeding and did not need to be proved, because the stones were admittedly in the United States without being subjected to required customs proceedings and as a result were contraband, subject to seizure. Firearms are not contraband and are not subject to seizure unless they are used or intended to be used in violation of the Gun Control Act. This issue of whether the firearms were used or intended to be used in violation of the Act was tried in No. 77-00013 and conclusively decided. The government now wishes to relitigate the same issue hoping for a different result.

To support a conviction under 18 U.S.C. § 922(a) the government must prove two essential elements: First, that the defendant, between the dates specified in the indictment, engaged in the business of dealing in firearms (or ammunition); and second, that at the time he engaged in that business he was not a licensed importer, licensed manufacturer, or licensed dealer in firearms. 2 Devitt and Blackmar, *Federal Jury Practice and Instructions* § 59.10.

The same two essential elements must be proved in the forfeiture action. The same firearms that were introduced into evidence in the criminal action are the subject of the forfeiture action. The United States had its day in court on these identical issues in the criminal proceeding and is collaterally estopped by the verdict in that case from pursuing the matter in this forfeiture action.

Title 18, U.S.C. § 924(d) states:

> Any firearm or ammunition *involved in or used or intended to be used* in the violation of any of the provisions of this chapter or any rule or regulation promulgated thereunder, or any violation of any other criminal law of the United States, shall be subject to seizure and forfeiture . . . . (Emphasis added)

The criminal verdict conclusively decided that the firearms in question were not "involved in or used or intended to be used in the violations of any provision of this chapter."

The government, in addition to *One Lot Emerald Cut Stones*, relies upon *Glup* v. *United States*, 523 F.2d 557 (8th Cir. 1975), *Epps* v. *Bureau of Alcohol, Tobacco, and Firearms*, 357 F.Supp. 345 (E.D. Tenn. 1973) and *United States* v. *One (1) 1969 Buick Riviera Automobile*, 493 F.2d 553 (5th Cir. 1974). This reliance is misplaced. In *Glup* the firearms were seized on June 8, 1970 and declared forfeited on August 11, 1970, because Glup had taken no action to contest the seizure and forfeiture. Two years later Glup was indicted on three counts charging violation of 18 U.S.C. § 922(a) and three counts charging him with violation of 18 U.S.C. App. § 1202. The forfeited firearms were used in evidence at the trial on these charges, but none of the six counts involved firearms included in the June 8, 1977 seizure. Glup was acquitted on all six counts by a jury. In *Glup* the forfeiture preceded the criminal acquittal, and the charges contained in the indictment did not involve the firearms which had been declared forfeited.

In *Epps* the plaintiff was seeking return of certain firearms and ammunition which had been seized and

used against him in a criminal proceeding based upon 18 U.S.C. § 922(a), but the court did not mention the United States Supreme Court decision of *Coffey* v. *U.S.*, which was still good law as evidenced by footnote 5 in *One Lot Emerald Cut Stones*, a case decided in 1972, the year prior to the *Epps* decision.

In *One (1) 1969 Buick Riviera Automobile*, the individual was charged with importing marijuana, but the criminal charges were dismissed prior to trial, and the Fifth Circuit was careful to point out that no issue had been actually litigated by the dismissal of the prior criminal charge and, therefore, *Coffey* did not apply.

The government argues that this forfeiture is a civil proceeding and as such is not barred by the jury verdict in the criminal case. The present forfeiture is criminal in nature and the prior jury verdict is a bar to the present proceeding.

In *Boyd* v. *United States*, 116 U.S. 116 (1885) (decided in the same term as *Coffey*) the court concluded:

> We are also clearly of the opinion that proceedings instituted for the purpose of declaring a forfeiture of a man's property by reason of offenses committed by him, though they may be civil in form, are in their nature criminal. Page 633, 634.

The present forfeiture is for offenses allegedly committed by Mulcahey, who has been found innocent of these charges.

The forfeiture provision set forth in § 924(d) is a part of the "Penalties" section of the law. Everything in § 924 provides a penalty, be it fine, prison or forfeiture, for the violation of a provision of the Gun

Control Act. The forfeiture provision is merely a way of disposing of the firearms which have been used in violation of the Act, after there is a conviction of such violation. Forfeiture is a penalty suffered by a defendant in addition to a fine and/or imprisonment. If Mulcahey had been convicted, he could have been fined and/or imprisoned and would have lost all of his firearms under § 924(d). But he was acquitted on the charge of being a gun dealer without a license. However, the government still wishes to invoke the penalty of § 924(d). Mulcahey would thereby be subject to the same penalty of losing his property for an activity for which he had been found not guilty.

Helvering v. *Mitchell*, 303 U.S. 391 (1938) is not controlling. It involved assessment of a penalty for tax fraud after acquittal of a charge of willful evasion. The court held, at 399, that the question was one of statutory construction, that is whether Congress intended to punish criminals twice for the same offense. The court went on to find that the civil fraud penalty was remedial in character and was ". . . provided primarily as a safeguard for protection of the revenue and to reimburse the Government for the heavy expense of investigation and loss resulting from the taxpayer's fraud." *Id.* at 401.

There is nothing remedial about forfeiture under § 924(d). The firearms do not go into the public treasury to offset the expense of operating the ATF. These firearms are destroyed.

Marcus v. *Hess*, 317 U.S. 537 (1943) involved a claim of defrauding the United States through a device of collusive bidding on P.W.A. projects in the Pittsburg area. The defendants were indicted for defrauding the government and upon a plea of nolo contendere were fined $54,000. Thereafter the pres-

ent action was brought under a qui tam statute which allowed a suit to be brought by an informer in the name of the United States. The informer would receive half of the amount of the recovery, which recovery would include double the amount of damages sustained and the sum of $2,000 for each violation. *Marcus* is not applicable because the defendant pled guilty and was not acquitted. Also, the $2,000 added to the double damages is simply a way of establishing damages in a civil action, similar to treble damages under the antitrust law, and does not represent a second fine.

Rex Trailer Co. v. *United States*, 350 U.S. 148 (1955) also involved a defendant who had pled nolo contendere to a five count indictment of fraudulently purchasing motor vehicles from the United States under the Surplus Property Act of 1944. He was fined $25,000 in criminal court and objected on the grounds of double jeopardy to a civil penalty under the Act which provided that every person engaged in any fraudulent trick or scheme to obtain property from the United States should pay the United States the sum of $2,000 for each act and double the amount of any damage to the United States. Section 26 of the Surplus Property Act, 58 Stat. 765, 780, 50 U.S.C. App. (1946 ed.) § 1635(d) provided: "The civil remedies provided in this section shall be in addition to all other criminal penalties and civil remedies provided by law."

Obviously Congress intended for there to be a criminal and a civil remedy for violating the Surplus Property Act. There is no such intent evidenced by Congress for a violation of the Gun Control Act. The forfeiture provision is contained in the same section with the criminal penalties.

There are no civil remedies contained in § 924, or anywhere else in the Gun Control Act.

For the reasons set forth above, the court concludes that the acquittal in the prior criminal action involving the identical facts and essential elements is a bar to the present forfeiture proceeding. Therefore, the judgment of the district court is

REVERSED.

WINTER, Chief Judge, with whom BUTZNER, RUSSELL, and MURNAGHAN join, dissenting:

We respectfully dissent for the reasons set forth in the dissent to the panel opinion, United States v. One Assortment of 89 Firearms, 669 F.2d 206, 210-13 (4 Cir. 1982), and the additional reasons which follow.

In oral argument before us, counsel for Mulcahey conceded that he asserted entrapment as a defense in his trial for violation of 18 U.S.C. § 922(a)(1), and that defense was submitted to the jury. Of course, in returning a verdict of not guilty, the jury did not specify the grounds of acquittal, but it is equally possible that the jury found that Mulcahey was engaged in the business of dealing in firearms without a license, but had been entrapped into committing an illegal sale, as found that Mulcahey was not so engaged. Thus in our view, the majority errs when it confidently asserts that the jury verdict in the criminal action conclusively settled the issue that Mulcahey was not engaged in the business of dealing in firearms without a license.

But irrespective of the factual issue of Mulcahey's guilt or innocence, we remain convinced that the forfeiture provisions of 18 U.S.C. § 924(d) are civil in nature so that *any* determination in the criminal prosecution is irrelevant to a decision of forfeiture. Our conclusion is reinforced by the language of that subsection. It states disjunctively that "[a]ny firearm involved in or used or *intended to be used* in, any violation of this chapter . . . shall be subject to seizure and forfeiture . . ." (emphasis added). *Id.* Nothing in the provision of § 922 under which Mulcahey was prosecuted renders an *intention* to engage in the business of dealing in firearms without a li-

cense illegal.* Only the completed act of engaging in the prohibited business is rendered unlawful. It is at once apparent that the forfeiture provisions of the Act were intended by Congress to be broader in scope than the criminal sanctions. This is persuasive evidence that Congress did not intend forfeitures to be an additional penalty for the commission of a criminal act but rather that they be a separate civil sanction, remedial in nature.

We would affirm the judgment of the district court.

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* While the majority asserts that the "issue of whether the firearms were used or *intended to be used* in violation of the Act was tried . . . and conclusively decided" (emphasis added) in the earlier criminal case, the emphasized portion of that statement lacks record support. Mulcahey was indicted and acquitted for a violation of 18 U.S.C. § 922(a)(1) which provides:

> (a) It shall be unlawful—
>
> (1) for any person, except a licensed importer, licensed manufacturer, or licensed dealer, to engage in the business of importing, manufacturing, or dealing in firearms or ammunition, or in the course of such business to ship, transport, or receive any firearm or ammunition in interstate or foreign commerce.

Manifestly the question of whether Mulcahey intended to use the firearms he possessed in violation of the statute was neither an issue nor was it decided in his criminal trial.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 81-1055

UNITED STATES OF AMERICA, APPELLEE

v.

ONE ASSORTMENT OF 89 FIREARMS, APPELLANT

NATIONAL RIFLE ASSOCIATION OF AMERICA, AMICUS CURIAE

Appeal from the United States District Court for the District of South Carolina, at Columbia. Charles E. Simons, Jr., District Judge

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Argued: November 3, 1981 Decided: January 26, 1982

Before WINTER, Chief Judge, FIELD, Senior Circuit Judge and CHAPMAN, Circuit Judge.

CHAPMAN, Circuit Judge

An action for forfeiture was brought by the United States of America against 89 (originally 92) firearms it seized under a search warrant of the premises of Patrick M. Mulcahey. Paragraph 6 of the complaint seeking forfeiture alleges:

> That said firearms were had and possessed and used and intended to be used on January 20, 1977, and prior thereto by Patrick M. Mulcahey in Richland County, South Carolina, in violation of the laws of the United States by engaging in the business of a dealer in firearms and ammunition without the said Patrick M. Mulcahey having first applied for and received a license as a dealer in firearms and ammunition as required by 18 U.S.C. 923(a); and said firearms having been used and intended to be used and involved in said unlicensed firearms business in violation of 18 U.S.C. 922(a)(1) and 923(a), thereby became forfeited to the United States under the provisions of 18 U.S.C. 924(d).

The same 89 firearms were introduced as exhibits in Criminal Action 77-00013 brought in the United States District Court for the District of South Carolina by the United States of America against Patrick M. Mulcahey under an indictment charging that he unlawfully and knowingly engaged in the business of dealing in firearms without being licensed in violation of 18 U.S.C. § 922(a)(1) and § 924(a). The criminal case was tried before a jury and resulted in a not guilty verdict on March 16, 1977.

This not guilty criminal verdict was raised as a defense in the forfeiture action, but upon motion of the United States the defense was stricken from defendant's answer. The forfeiture action was then tried without a jury, and the Court concluded:

> . . . [T]he firearms here in question were involved in, used or intended to be used in violation of 18 U.S.C. § 922(a)(1). Such firearms are rendered subject to forfeiture under 18 U.S.C. § 924(d), which forfeiture is hereby ordered.

In connection with this conclusion, the Court found that these firearms were used by Patrick M. Mulcahey from May 13, 1976, to January 20, 1977, while Mulcahey was engaged in the business of dealing in firearms without being properly licensed. The criminal indictment against Mulcahey charged him with being engaged in the business of dealing in firearms without being licensed to do so from on or about May 12, 1976, up to the return of the indictment on January 19, 1977.

Mulcahey, the claimant in the present action, seeks return of the 89 firearms upon the ground that the jury verdict in the criminal action conclusively settled the issue that he was not engaged in the business of dealing in firearms without a license, so the firearms could not have been used by him while engaged in such a business without a license.

Mulcahey contends that the present action is barred by the holding in *Coffey* v. *U.S.*, 116 U.S 436, 6 S. Ct. 437, 29 L.Ed. 684 (1886). We agree.

Coffey was tried on a criminal charge of violating the revenue laws of the United States by operating a distillery without payment of the required taxes. He was acquitted on this charge, and shortly thereafter the United States sought forfeiture of the distilling equipment. Coffey raised the prior acquittal as a bar to the forfeiture action and the Supreme Court agreed stating at page 442:

> The principal question is as to the effect of the indictment, trial, verdict and judgment of acquittal set up in the fourth paragraph of the answer. The information is founded on sections 3257, 3450 and 3453; and there is no question, on the averments in the answer, that the fraudulent acts and attempts and intents to defraud, alleged

in the prior criminal information, and covered by the verdict and judgment of acquittal, embraced all of the acts, attempts and intents averred in the information in this suit.

The question, therefore, is distinctly presented, whether such judgment of acquittal is a bar to this suit. We are of opinion that it is.

At 443 the Court stated:

Yet, where an issue raised as to the existence of the act or fact denounced has been tried in a criminal proceeding, instituted by the United States, and a judgment of acquittal has been rendered in favor of a particular person, that judgment is conclusive in favor of such person, on subsequent trial of a suit *in rem* by the United States, where, as against him, the existence of the same act or fact is the matter in issue, as a cause for the forfeiture of the property prosecuted in such suit *in rem*. It is urged as a reason for not allowing such effect to the judgment, that the acquittal in the criminal case may have taken place because of the rule requiring guilt to be proved beyond a reasonable doubt; and that, on the same evidence, on the question of preponderance of proof, there might be a verdict for the United States, in the suit *in rem*. Nevertheless, the fact or act has been put in issue and determined against the United States; and all that is imposed by the statute, as a consequence of guilt, is a punishment therefor. There could be no new trial of the criminal prosecution after the acquittal in it; and a subsequent trial of the civil suit amounts to substantially the same thing, with a difference only in the consequences following a judgment adverse to the claimant.

Coffey was acquitted on a charge of operating a still without paying the necessary tax thereon and could raise this acquittal as a bar to an action for forfeiture of the distilling equipment. Mulcahey was acquitted on a charge of being engaged in the business of dealing in firearms without a license and can raise this acquittal as a bar to the present forfeiture action involving the 89 firearms, since a jury has already found that these 89 firearms were not being used by Mulcahey in the business of dealing in firearms without a license.

The government argues that the present action is controlled by *One Lot Emerald Cut Stones and One Ring* v. *United States*, 409 U.S. 232 (1972), in which the Court held that forfeiture of the ring and stones was not barred by the owner's acquittal on charges of violating 18 U.S.C. §545 which covers willfully and knowingly, with intent to defraud the United States, smuggling articles into the United States without submitting the same to required customs procedures. The Court found that the second action was not barred because the essential elements of proof in the two actions were not the same. In the criminal action it was necessary to prove a knowing and willful intent to defraud the United States, which was not required in the forfeiture. The Court was careful to point out that if the elements of proof were the same then the government would be barred. At page 234 the Court stated:

> Collateral estoppel would bar a forfeiture under § 1497 if, in the earlier criminal proceeding, the elements of a § 1497 forfeiture had been resolved against the government. *Ashe* v. *Swenson*, 397 U.S. 436, 443 (1970).

In Mulcahey's criminal proceeding the elements of the present forfeiture were all resolved against the government, so the present action is barred by collateral estoppel.

One Lot Emerald Cut Stones did not overrule *Coffey*. The One in *One Lot Emerald Cut Stones*, at footnote 5 distinguished the two cases as follows:

> The difference in the issues involved in the criminal proceeding, on the one hand, and the forfeiture action, on the other, serves to distinguish *Coffey* v. *United States*, 116 U.S. 436 (1886), relied upon by the District Court in the present case. *Coffey* involved a forfeiture action commenced after an acquittal. This Court noted, in holding the forfeiture barred, that "[t]he information [for forfeiture] is founded on §§ 3257, 3450 and 3453; and there is no question, on the averments in the answer, that the fraudulent acts and attempts and intents to defraud, alleged in the prior criminal information, and covered by the verdict and judgment of acquittal, embraced all of the acts, attempts and intents averred in the information in this suit." *Id.*, at 442. The Court specifically distinguished the situation where "a certain intent must be proved to support the indictment, which need not be proved to support the civil action." *Id.*, at 443. See also *Stone* v. *United States*, 167 U.S. 178 (1897).

To support a conviction under 18 U.S.C. § 922(a) the government must prove two essential elements: First: that the defendant, between the dates specified in the indictment, engaged in the business of dealing in firearms (or ammunition); and second: that at the time he engaged in that business he was not a

licensed importer, licensed manufacturer, or licensed dealer in firerms. 2 Devitt and Blackmar, *Federal Jury Practice and Instructions* § 59.10.

The same two essential elements must be proved in the forfeiture action. The same firearms that were introduced into evidence in the criminal action are the subject of the forfeiture action. The United States had its day in court on these identical issues in the criminal proceeding and is collaterally estopped by the verdict in that case from pursuing the matter in this forfeiture action.

Title 18, U.S.C. § 924(d) states:

> Any firearm or ammunition *involved in or used or intended to be used* in the violation of any of the provisions of this chapter or any rule or regulation promulgated thereunder, or any violation of any other criminal law of the United States, shall be subject to seizure and forfeiture . . . (Emphasis added)

The criminal verdict conclusively decided that the firearms in question were not "involved in or used or intended to be used in the violations of any provision of this chapter."

The government, in addition to *One Lot Emerald Cut Stones*, relies upon *Gulp* v. *United States*, 523 F.2d 557 (8th Cir. 1975), *Epps* v. *Bureau of Alcohol, Tobacco, and Firearms*, 357 F.Supp. 345 (E.D. Tenn. 1973) and *United States* v. *One (1) 1969 Buick Riviera Automobile*, 493 F.2d 533 (5th Cir. 1974). This reliance is misplaced. In *Gulp* the firearms were seized on June 8, 1970 and declared forfeited on August 11, 1970, because Gulp had taken no action to contest the seizure and forfeiture. Two years later Gulp was indicted on three counts charging violation

of 18 U.S.C. § 922(a) and three counts charging him with violation of 18 U.S.C. App. § 1202. The forfeited firearms were used in evidence at the trial on these charges, but none of the six counts involved firearms included in the June 8, 1977 seizure. Gulp was acquitted on all six counts by a jury. In *Gulp* the forfeiture preceded the criminal acquittal and the charges contained in the indictment did not involve the firearms which had been declared forfeited.

In *Epps* the plaintiff was seeking return of certain firearms and ammunition which had been seized and used against him in a criminal proceeding based upon 18 U.S.C. § 922(a), but the Court did not mention the United States Supreme Court decision of *Coffey* v. *U.S.*, which was still good law as evidenced by footnote 5 in *One Lot Emerald Cut Stones*, a case decided in 1972, the year prior to the *Epps* decision.

In *One (1) 1969 Buick Riviera Automobile*, the individual was charged with importing marijuana, but the criminal charges were dismissed prior to trial, and the Fifth Circuit was careful to point out that no issue had been actually litigated by the dismissal of the prior criminal charge and, therefore, *Coffey* did not apply.

For the reasons set forth above, the Court concludes that the acquittal in the prior criminal action involving the identical facts and essential elements is a bar to the present forfeiture proceeding. Therefore, the judgment of the district court is

REVERSED.

WINTER, Chief Judge, dissenting:

In this appeal, the claimant contends that the forfeiture is barred by his acquittal on the earlier criminal charges. This conclusion is required, he asserts, by both the double jeopardy clause and the doctrine of res judicata because the forfeiture is criminal in nature. Even if the forfeiture is deemed to be civil in nature, he continues, it is barred by the doctrine of collateral estoppel. Based upon its reading of coffey v. United States, 116 U.S. 436 (1886), the majority holds that the forfeiture is barred. I concede that *Coffey* hold that a subsequent *criminal* forfeiture is barred by an earlier acquittal on criminal charges arising out of the same facts and that this aspect of *Coffey* is viable today. I think, however, that more recent Supreme Court decisions compel the conclusion that the forfeiture in the present case is civil and that the doctrine of collateral estoppel is inapplicable because the standards of proof in criminal and civil proceedings are different. I therefore respectfully dissent.

I.

In a pair of early cases, the Supreme Court held that nominally civil penalty proceedings brought subsequent to criminal proceedings based on the same allegations were barred by the double jeopardy clause. *See* United States v. Ulrici, 102 U.S. 612 (1881); United States v. Chouteau, 102 U.S. 603 (1881). And in *Coffey*, the Supreme Court ignored the double jeopardy argument but nonetheless held that a subsequent forfeiture proceeding was barred, relying upon some nonconstitutional doctrine of preclusion. From a reading of *Coffey*, one cannot be certain whether or not the Court deemed the forfeiture proceeding to be criminal in nature, and thus whether

the decision was based on res judicata (if so) or on collateral estoppel (if not). *See* 1B J. Moore & T. Currier, *Moore's Federal Practice* ¶ 418[3], at 2855 & n.13 (2d ed. 1980).

It is commonly asserted that a criminal acquittal cannot collaterally estop a contrary finding on ony issues in a later civil proceeding because of the differing standards of proof involved. *See, e.g.*, 18 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 4474, at 757 (1981). Logically, the fact that X was not shown beyond a reasonable doubt does not rule out the possibility that X can be shown by a preponderance of the evidence. To the extent that the *Coffey* decision rested on collateral estoppel (*i.e.*, to the extent that the Court held that the forfeiture proceeding was barred even if civil in nature), the Court was rejecting this standard of proof argument.

Subsequent Supreme Court cases, however, interpreted *Coffey* as being based on a belief that the forfeiture there at issue—a forfeiture of illegal liquor—was criminal in nature. *See* Helvering v. Mitchell, 303 U.S. 391, 405-06 (1938); Murphy v. United States, 272 U.S. 630, 631-32 (1926); Stone v. United States, 167 U.S. 178, 186-87 (1897). And in all three of these cases, the Court very clearly indicated that if the forfeiture proceeding is civil in nature, the standard of proof argument, by itself, is enough to defeat any resort to collateral estoppel. *See* Helvering v. Mitchell, *supra*, 303 U.S. at 397 (using "res judicata" in the broad sense, encompassing collateral estoppel); Murphy v. United States, *supra*, 272 U.S. at 632-33; Stone v. United States, *supra*, 167 U.S. at 188. Indeed, the rejection of the collateral estoppel argument was so complete that the petitioners in United States *ex rel.* Marcus v. Hess, 317 U.S. 537 (1943), and Rex Trailer Co. v. United States, 350 U.S. 148 (1956),

did not even press it, confining themselves instead to arguing that the subsequent proceeding was criminal in nature. The collateral estoppel argument *was* raised in One Lot Emerald Cut Stones v. United States, 409 U.S. 232 (1972), but the Court rejected it on two alternative grounds. First, the Court stated that the criminal proceeding involved an issue of intent not present in the forfeiture proceeding. *Id.* at 234-35. Second, and more important for our purposes, the Court stated that the difference in the standards of proof in the two proceedings precluded application of the doctrine of collateral estoppel. *Id.* at 235.

Thus, it can be said today that "[p]roblems arise only when it is asserted that a nominally civil action brought by the government involves an element of punishment that runs afoul of double jeopardy principles." 18 C. Wright, A Miller & E. Cooper, *supra*, § 4474, at 749. Every time the Supreme Court has faced this double jeopardy question since *Coffey*, it has deemed the later proceeding to be civil in nature and thus upheld the forfeiture or penalty. *See* One Lot Emerald Cut Stones v. United States, *supra*, 409 U.S. at 235-37; Rex Trailer Co. v. United States, *supra*, 350 U.S. at 151-52; United States *ex rel.* Marcus. v. Hess, *supra*, 317 U.S. at 548-52; Helvering v. Mitchell, *supra*, 303 U.S. at 398-405; Murphy v. United States, *supra*, 272 U.S. at 631-32; Stone v. United States, *supra*, 167 U.S. at 187-88. The same result has been reached in the clear majority of lower court decisions addressing the question. *See* cases cited in 1B J. Moore & T. Currier, *supra*, ¶ 418[3] (2d ed. 1980 & 1980-81 Cum. Supp.).[1]

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[1] *Coffey* has never, however, been overruled. Though *Coffey* has been sharply criticized, *see* cases cited in 1B J. Moore & T. Currier, *supra*, ¶ 418[3], at 2854 n.12 (2d ed. 1980), an

Marcus is a good example of the Supreme Court's handling of the question. There, the Court held that a penalty proceeding for defrauding the government by collusive bidding did not violate the guarantee against double jeopardy even though the defendants had been charged and convicted for a crime based on the same allegations. Relying upon the general principles discussed in *Mitchell*, which held that Congress may impose both a criminal and civil sanction in respect to the same act or omission, the Court said that the issue in each case was a statutory one—was the forfeiture or penalty criminal or remedial? The penalty in *Marcus* was held to be civil—and therefore constitutionally permissible—because its purpose was to reimburse the government for monies of which it had been defrauded.

One Lot developed this concept further. In that case an acquitted smuggler contended that a nominally civil proceeding brought for the forfeiture of the allegedly smuggled goods was actually criminal, and thus prohibited by the double jeopardy clause. The Court held that it was not a violation of the double jeopardy clause to punish a wrongdoer both criminally and civilly, and that the forfeiture was a civil proceeding because its purpose was to aid in the enforcement of tariff regulations by preventing smuggled merchandise from circulating in the United States.

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occasional lower court decision follows it, deems a nominally civil forfeiture or penalty proceeding to be criminal in nature, and deems the forfeiture or penalty proceeding to be barred because a criminal proceeding had previously been brought, *see* cases cited in *id.* ¶ 418[3], at 2851 n.1, 2856 n.16 (2d ed. 1980 & 1980-81 Cum. Supp.). Most of these cases, like *Coffey*, dealt with illegal liquor.

III.

One Lot, in my view, is controlling here. The forfeiture statute here, 18 U.S.C. § 924(d), was manifestly designed to aid in the enforcement of gun control laws by preventing the circulation of firearms which had been illegally obtained. *One Lot* thus compels the conclusion that the forfeiture at issue here is civil in nature,[2] so that the double jeopardy and res judicata claims must be rejected. It matters not, despite the majority's views, that the necessary allegations in the criminal proceeding and the forfeiture proceeding were identical. *One Lot* also compels the conclusion that the difference in the standards of proof in the two proceedings obviates the collateral estoppel claim.[3]

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[2] Many cases have held that the preponderance-of-the-evidence standard applies in § 924(d) forfeitures because they are civil in nature. *See, e.g.*, United States v. Eighty-Six Firearms, 623 F.2d 643 (10 Cir. 1980); United States v. 1,922 Assorted Firearms, 330 F. Supp. 635 (E.D. Mo. 1971); United States v. One Assortment of 12 Rifles, 313 F. Supp. 641 (N.D. Fla. 1970).

[3] This is the point on which the majority and I differ. The majority relies on the statement in *One Lot* that: "Collateral estoppel would bar a forfeiture under § 1497 if, in the earlier criminal proceeding, the elements of a § 1497 forfeiture had been resolved against the Government." 409 U.S. at 234 (citation omitted). The majority also relies on a footnote in *One Lot* in which the Court distinguished *Coffey* on the ground that the criminal proceeding and the forfeiture there involved identical allegations, rather than on the ground that the forfeiture there was criminal in nature. *See id.* at 235 n.5. Viewed in isolation, these two snippets support the majority. But they cannot be read in a vacuum. In the course of the same discussion, the *One Lot* Court advanced the standard of proof argument as an independent ground for rejecting the invocation of collateral estoppel. *See id.* at 235. Moreover, if the *One Lot* Court rejected the standard

The two courts that have addressed the precise question presented in this case have stated that the § 924(d) forfeiture proceeding is not barred. *See* Glup v. United States, 523 F.2d 557 (8 Cir. 1975) (dictum); Epps v. Bureau of Alcohol, Tobacco and Firearms, 375 F. Supp. (S.D. Tenn. 1973), *aff'd without opinion*, 495 F.2d 1373 (6 Cir. 1974). The majority attempts to distinguish these two cases. As for *Glup*, the majority points out that there, unlike in the present case, different firearms were involved in the criminal proceeding than were involved in the forfeiture. This observation is correct, and that apparently renders the court's discussion in *Glup* dictum. But, although dictum, the Eighth Circuit explicitly stated that § 924(d) forfeitures are civil in nature, thereby disposing of the double jeopardy and res judicata arguments, and also stated: "Even assuming, *arguendo*, that the criminal trial and the forfeiture involved some of the same firearms, the collateral estoppel doctrine, which is at the core of the appellant's present contention, does not apply." 523 F.2d at 561. Not surprisingly, the reason the court gave for this last conclusion was the difference in the standards of proof involved in the two proceedings. *Id.* As for *Epps*, the majority notes that it fails to mention *Coffey*. But that is of no significance since *Coffey*, as I have already indicated, is inapposite.

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of proof argument, it broke with the explicit reasoning of a half-dozen cases decided by the Supreme Court since *Coffey*. *One Lot* contains not the slightest hint, however, that the Court thought that is what it was doing. The majority declines even to mention *One Lot*'s discussion of standards of proof or a single one of the Supreme Court cases that intervened between *Coffey* and *One Lot*.

IV.

In my view of the case, I am brought finally to claimant's contention that the district court's factual findings should be set aside on appeal. The government argues that the scope of review is limited to a determination of whether the district court abused its discretion. There is a dearth of authority on the question of the scope of review. I would be inclined to hold that the proper scope of review is the "not clearly erroneous" test of Rule 52, Fed. R. Civ. P., but I would find it unnecessary to decide the issue here, because I think that the district court's findings pass either test.

I would affirm the judgment of the district court.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 81-1055

UNITED STATES OF AMERICA, APPELLEE

vs.

ONE ASSORTMENT OF 89 FIREARMS, APPELLANT

NATIONAL RIFLE ASSOCIATION OF AMERICA, AMICUS CURIAE

JUDGMENT

Appeal from the United States District Court for the District of South Carolina

THIS CAUSE came on to be heard on the record and the petition for rehearing, and the said cause was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, upon rehearing, that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, reversed.

Aug. 23, 1982

/s/ William K. Slate, II
Clerk

APPENDIX D

IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Civil Action No. 77-590

UNITED STATES OF AMERICA, PLAINTIFF

—versus—

ONE ASSORTMENT OF 89 FIREARMS, DEFENDANT

Dec. 30, 1980

ORDER

This forfeiture action, brought pursuant to 18 U.S.C. § 924(d), comes before the court with a long and somewhat complex history.

The assortment of firearms in question was seized by the Bureau of Alcohol, Tobacco and Firearms on January 20, 1977, from the residence of Patrick M. Mulcahey in Columbia, S.C. Subsequently, Patrick Mulcahey was tried for alleged criminal violations pertaining to such firearms.[1] A jury found Mulcahey not guilty of the charges against him on March 16, 1977.

On March 31, 1977, the plaintiff filed this civil action *in rem* seeking forfeiture to the United States of an assortment of firearms, as identified in an exhibit to the Complaint. The basis for such forfeiture, as alleged in the Complaint, was that: "said firearms

[1] Mulcahey's Indictment alleged violations of 18 U.S.C. §§ 922(a)(1) and 924(a). It charged that, from on or about May 12, 1976 up to the return of the Indictment on January 19, 1977, Mulcahey was engaged in the business of dealing in firearms without being licensed to do so.

were had and possessed and used an intended to be used on January 20, 1977, and prior thereto by Patrick M. Mulcahey in Richland County, South Carolina, in violation of the laws of the United States by engaging in the business of a dealer in firearms and ammunition without the said Patrick M. Mulcahey having first applied for and received a license as a dealer in firearms. . . ." A warrant for arrest and notice was issued April 4, 1977. Patrick M. Mulcahey filed a Claim and Answer on April 14, 1977.

Upon Motion of the Plaintiff, the court ordered amendment of the Complaint on July 6, 1977, and on the same date issued a Warrant for Arrest and Notice thereon. On July 18, 1977, the claimant filed his Claim and Answer to the Amended Complaint. Subsequent to that time, the parties entered into discovery proceedings and as a result thereof have stipulated that the transcript of the aforementioned criminal proceeding, *United States* v. *Mulcahey*, Criminal No. 77-0013 (D.S.C. 1977), would be submitted to the court in lieu of testimony.

By Order dated November 14, 1978, Judge Robert W. Hemphill, to whom this case was assigned initially, granted the plaintiff's Motion to Strike the second and third defenses of the defendant's Answer, and denied the claimant's Motion for Summary Judgment. Pursuant to the parties' stipulations, the case was submitted for decision on the basis of the aforementioned transcript and briefs, all of which have been filed with the court.

From this background, and on the basis of the evidentiary sources presented by the government and the claimant, the court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. The commencement of this action was authorized, sanctioned and directed in accordance with 26 U.S.C. § 7401, as demonstrated by a letter with attachments from James C. Bright, Regional Counsel, Bureau of Alcohol, Tobacco and Firearms, Department of the Treasury, said letter being incorporated into plaintiff's Brief as Appendix II.

2. The claimant, Patrick M. Mulcahey, did not have a Federal firearms dealer's license during the period July 1, 1975 to March 31, 1977, as shown by the certification of the lack of such record in official files by the Supervisor, Firearms Explosives Licensing Section, Regulatory Enforcement, Bureau of Alcohol, Tobacco and Firearms, United States Department of the Treasury for the Southeast Region, Atlanta, Georgia. This certification and attendant documents are incorporated in plaintiff's Brief as Appendix III.

3. On May 13, 1976, the claimant at his residence, 1407 Woodlawn Avenue, Columbia, South Carolina, sold a Ruger .357 Magnum Pistol, Serial Number 150-43012 to undercover Special Agent George D. Ferguson, Jr., and informant Kenneth E. Williford for $130. On this occasion, according to Special Agent Ferguson's report, the claimant possessed and offered for sale three other firearms, to wit: A Colt .38 Special Automatic for $160; a Carbine for $160; a .38 Caliber Rifle. The claimant stated, according to Ferguson's report, that he had 5,000 rounds of .223 caliber ammunition and would take $450 for it. Also, it was stated in the report that Williford was present with a firearm described as an "Enforcer" and Mulcahey offered him $60 plus the carbine for it.

4. On May 19, 1976, at his residence, the claimant sold a Taurus .38 Calriber Pistol, Serial Number 858162 to undercover Special Agent Ferguson and informant Williford for $90. On this occasion, ac-

cording to the agent's report, the claimant possessed and offered for sale four other firearms, to wit: A .38 caliber rifle for $100; a 9 mm automatic nine-shot for $175; a Smith & Wesson .357 Magnum, Model 19 for $215; and a .45 automatic for $175. When asked if he had any more guns for sale, the claimant replied, according to the agent's report, that he did not know exactly what he had on hand and did not know how many he wanted to sell. According to the report, when the claimant again asked about the "Enforcer," informant Kenneth E. Williford stated that it needed repairs. Claimant replied that he would like to take it and fix it.

5. On May 26, 1976, at his residence, the claimant sold a Smith & Wesson 9 mm automatic, Model 39-2, Serial Number A275312 to informant Kenneth E. Williford for $180 in the presence of Special Agent George D. Ferguson, Jr. Prior to making this sale the claimant required Williford to execute a Form 4473 which was later seized at claimant's residence on January 20, 1977. According to the agent's report, at the time of the sale of this firearm, the claimant possessed and offered for sale the following firearms: an Army .45 automatic, a .22 rifle, a carbine, a .357 Smith & Wesson, and a Colt .45 caliber with pearl handles. The claimant said that he would sell Williford more guns. The claimant again said that he would like to have the "Enforcer" and Williford told him that he thought he had it sold.

6. In mid 1976, the claimant purchased a Smith & Wesson .357 revolver, Serial Number 8K15410, from non-licensee, Karl O. Grant, for $150. This weapon was seized on January 20, 1977, from the claimant and is on the list of firearms atatched to the forfeiture Complaint.

7. In the latter part of 1976, the claimant purchased a Smith & Wesson, Model 60, Revolver, .38

caliber, Serial Number R132162 from non-licensee, Randall B. Richardson, for $170. This firearm was seized on January 20, 1977, from the claimant and is on the list of firearms attached to the forfeiture Complaint.

8. On August 21, 1976, the claimant purchased from Thomas O. Lain, d/b/a Lain's Gun Shop, a licensed firearms dealer, two Ruger caliber .223 rifles.

9. On October 5, 1976, the claimant purchased from Thomas O. Lain, d/b/a Lain's Gun Shop, a licensed firearms dealer, three Ruger Mini, Model 14, .223 Caliber Rifles, Serial Numbers 180-53444, 180-50813, and 180-51289. Two of these weapons, 180-53444 and 180-50813, were seized on January 20, 1977, from the claimant and are on the list of firearms attached to the forfeiture Complaint.

10. On December 31, 1976, the claimant purchased from Thomas O. Lain, d/b/a Lain's Gun Shop, a licensed firearms dealer, two firearms, to wit: One Ruger Mini, Model 14, .223 Caliber Rifle, Serial Number 180-49696, and one Smith & Wesson, 9 mm, Model 59, Pistol, Serial Number A345245. These two firearms were seized on January 20, 1977, from the claimant and are on the list of firearms attached to the forfeiture Complaint.

11. On January 13, 1977, the claimant at his residence offered for sale to informer Kenneth Williford and undercover Special Agent R. Jerry Embree two Springfield rifles for $150 each, two S & W Automatic Pistols, and one .357 Revolver. On this occasion, the claimant said everything he had was for sale except one pump shotgun that he was putting a front sight on.[2]

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[2] Agent Embree's contemporaneous interpretation of claimant's comment to mean "everything [they] saw on that

12. On January 20, 1977, Special Agent Robert Holland, assisted by other agents, executed a Federal search warrant on claimant's residence, 1407 Woodlawn Avenue, Columbia, South Carolina, and seized 105 firearms.

13. Thirteen of the 105 firearms seized were determined to have been stolen and were returned to their owners. The 92 remaining firearms were described on the list attached to the original Complaint. One Luger Model 1918, 9 mm automatic pistol, serial number 8914 was added by amendment to the original Complaint. From this total of 93 firearms, four were returned to the claimant's wife pursuant to Judge Robert Hemphill's Order of July 6, 1977. This leaves 89 firearms as the subject of this Order.

14. Of the 89 firearms remaining as the subject of this action, nine are the property of members of the Mulcahey family other than the claimant. As identified at Mulcahey's criminal trial, these firearms and their owners are as follows: Government's exhibits 77 and 78—property of claimant's wife; Government's exhibits 24 and 59—property of claimant's daughters; Government's exhibits 14, 91 and 97—property of claimant's older son; Government's exhibits 39 and 109—property of claimant's younger son.[3]

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occasion [was for sale,]" does not control the court's interpretation of claimant's words. Obviously enough, at the time claimant made the statement, Agent Embree could not have known of the full extent of the firearms inventory claimant possessed. Nor, in interpeting the remark as it was spoken, did Agent Embree have the advantage of the full course of claimant's activity spread before him, as this court does now.

[3] The court regards as insignificant the slight variance between claimant's testimony at trial and his answers to interrogatories concerning the ownership of certain firearms by his wife and children. Such small variance is explicable in

While the firearms owned by members of the Mulcahey family other than the claimant were present in the Mulcahey residence at the time of seizure, there is no evidence that these particular firearms were stored together with the firearms owned by the claimant, that they were offered for sale by the claimant, or that they were otherwise used in any manner in the forfeitable offense.

CONCLUSIONS OF LAW

1. The Government has proved by the preponderance of the evidence that the claimant, Patrick M. Mulcahey, was engaging in the business of dealing in firearms and ammunition without being licensed to do so as required by federal law. It is well established that a forfeiture proceeding under 18 U.S.C. § 924(d) is remedial in nature and is properly characterized a civil proceeding. *Bramble* v. *Richardson*, 498 F.2d 968 (10th Cir. 1974); *United States* v. *One (1) 1969 Buick Riviera Automobile*, 493 F.2d 553, 554 (5th Cir. 1974); *Epps* v. *Bureau of Alcohol, Tobacco & Firearms*, 375 F.Supp. 345, 346 (E.D.Tenn., 1973). Unlike the burden of proof "beyond a reasonable doubt" applicable in criminal cases, the burden of proof applicable in civil proceedings is the preponderance of the evidence standard. *Glup* v. *United States*, 523 F.2d 557 (8th Cir. 1975); *One Lot Emerald Cut Stones* v. *United States*, 409 U.S. 232 (1972); *One 1961 Lincoln Continental Sedan* v. *United States*, 360 F.2d 467 (8th Cir. 1966).

2. Appendix III of plaintiff's Brief, a Certificate of Lack of Official Record of Issuance of Firearms

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light of the large number of firearms involved in the overall matter. The court considers the claimant's trial testimony to be the more reliable.

Dealer's License to Patrick M. Mulcahey, 1407 Woodlawn Avenue, Columbia, South Carolina, for the period July 1, 1975, to March 31, 1977, shows that the claimant had not been issued a license to deal in firearms for the period of July 1, 1975, to March 31, 1977. The claimant *was* at one time licensed to deal in firearms. By his own admission at the criminal proceeding against him, Mulcahey held a federal firearms license from 1966 until sometime in 1975. However, the claimant bought and sold firearms on numerous occasions during the period from July 1975 through March 1977, when no license to deal had been issued to him. Evidence of these transactions clearly establishes that during an eight-month period from May 13, 1976, to January 20, 1977, the claimant did engage in the business of dealing in firearms without being licensed to do so. That this was the case is evidenced by the following summary of these transactions:

(a) seven purchases of firearms on four separate occasions;

(b) three offers to purchase a firearm (the same "Enforcer") on three separate occasions;

(c) three sales of firearms on three separate occasions;

(d) seventeen offers to sell firearms (at least nine different firearms) on four occasions.

In his answers to the plaintiff's interrogatories, the claimant exhibited a marked inability to recall the date he acquired the seized firearms, from whom and how these firearms were acquired, and the purchase price or other thing of value given by the claimant in exchange for each firearm. Of the 91 firearms

listed on the claimant's Answers to plaintiff's interrogatories, the claimant was unable to give any information regarding 53 of these firearms.

The claimant, in his answers to the plaintiff's interrogatories, recalled at least four occasions when he had purchased guns during the period in question; and he recalled the three sales of firearms and one sale of ammunition which occurred in May of 1976.

3. The type of firearms involved in these transactions, as well as most of the firearms seized, were not curios or relics, but of the sort commonly dealt in by licensed dealers. The claimant submitted that many of the guns were in fact curios or relics; but at trial, firearms expert Robert J. Scroggie testified that, at most, fourteen firearms were curios or relics, and only five were positively curious or relics. None of the firearms in question were identified as "antique firearms" within the meaning of 18 U.S.C. § 921(a)(16), so as to remove them from the definition of "firearm" under § 921(a)(3), and thereby from the prohibition of § 922(a)(1).

4. Of the claimant's purchases, three or four were of two or more of the same type firearm. The court considers this to be strong evidence of dealing in firearms, rather than collecting. In particular, of six Ruger Mini 14, .223 caliber rifles purchased by the claimant from August 21, 1976, to December 3, 1976, only three remained among those firearms seized pursuant to the warrant on January 20, 1977.

5. Resale of guns shortly after their purchase is yet another strong indicator of dealing in firearms. At trial, Special Agent Robert Holland testified that he had taken an inventory of the claimant's stock in 1974, during the period when the claimant was a federally licensed firearms dealer. Nineteen of the

firearms in the inventory at trial were present to Holland's inventory to Mr. Mulcahey's stock of 51 firearms in July, 1974.

6. Though proof that an unlicensed person is engaging in the business of dealing in firearms must, of course, be based on the evidence presented in each case, courts have upheld criminal convictions for unlicensed dealing in firearms under factual situations less aggravated than that of the instant case.

The sale of an unspecified number of firearms to a stranger, plus offers to sell firearms to agents, was held to be sufficient evidence to convict in *United States* v. *Apuzzo*, 555 F.2d 306 (2nd Cir. 1977), *cert. denied*, 435 U.S. 916 (1978).

The sale of seven handguns to undercover agents in four separate transactions in early 1970, and seizure of 96 new handguns at the defendant's home was sufficient in *United States* v. *Day*, 476 F.2d 562 (6th Cir. 1973). In the instant case, during the month of May, 1976, three firearms were sold to undercover agents in three separate transactions; twelve firearms were offered for sale to the agents; three offers for purchase of the "Enforcer" were made to the informer, Mr. Williford; and on May 19, 1976, the claimant even offered to repair the Enforcer for Mr. Williford. Furthermore, 105 firearms were seized from the claimant's residence at the time the search warrant was executed.

7. That several sales of firearms occur in a reasonably short space of time is evidence of dealing in firearms. *See United States* v. *Gross*, 451 F.2d 1355 (7th Cir. 1971), which involved the sale of eleven separate weapons in a two-month period; and *United States* v. *Williams*, 502 F.2d 581 (8th Cir. 1974), in which there were five sales of firearms to Government agents in a month's time.

8. A violation of 18 U.S.C. § 922(a)(1) does not require that the Government establish dealing as the equivalent of selling; nor does it require that the Government establish that the person engaged in the business of dealing in firearms make a profit. *United States* v. *Vitale*, 596 F.2d 688 (5th Cir. 1979); *see also United States* v. *Shirling*, 572 F.2d 532 (5th Cir. 1978). One sale to an agent along with the fact that the defendant considered himself to be and held himself out as a dealer was sufficient in *United States* v. *Swinton*, 521 F.2d 1255 (10th Cir. 1975), *cert. denied*, 424 U.S. 918 (1976).

In *United States* v. *Huffman*, 518 F.2d 80 (4th Cir.), *cert. denied*, 423 U.S. 864 (1975), the Fourth Circuit upheld a conviction based upon dealings involving more than a dozen transactions in the course of a few months, including trading large quantities of ammunition for firearms.

9. Crucial to a determination that one is dealing in firearms, is the representation or holding out by the defendant, or in the instant civil contest, by the claimant, that he buys and/or sells firearms and ammunition. In *United States* v. *Micieli*, 594 F.2d 102 (5th Cir. 1979), evidence of the defendant's acquisition of firearms along with the defendant's statement that he sold 10 firearms, was sufficient to establish "dealing in firearms." The only evidence of sale in *Micieli* was the defendant's statement.

In the instant case, the claimant had Mr. Williford execute a firearms Form 4473. This is a firearms disposition record which is presented by the seller to the buyer for him to fill out. It is a standard form which is used by licensed firearms dealers; it serves as protection for the licensed dealer in the event the buyer is a convicted felon or is otherwise restricted

in his ability to purchase firearms. The claimant even asked Mr. Williford for his driver's license number as identification on the form. Furthermore, on January 13, 1977, the claimant in the instant case represented to Mr. Williford and Special Agent R. Jerry Embree that "everything he had was for sale," except for one firearm on which he was working. This statement by the claimant is evidence that at that time he was engaging in the business of a dealer in firearms and had committed for the purpose of, and intended to use in, the said business, all the firearms he possessed, except one. This statement by the claimant also reflects the "willingness to deal" and "greater degree of activity than occasional sales by a hobbyist," suggested in *United States* v. *Huffman*, 518 F.2d 80 (4th Cir.), *cert. denied*, 423 U.S. 864 (1975).

10. In *United States* v. *One Assortment of 12 Rifles and 21 Handguns*, 313 F.Supp. 641 (N.D. Fla. 1970), and *United States* v. *One Assortment of Firearms and Ammunition*, 313 F.Supp. 1056 (E.D. Tenn. 1970), the claimants were engaged in the business of dealing in firearms and ammunition without being licensed to do so, in violation of 18 U.S.C. § 922(a)(1). The facts established that the claimants had been selling firearms, and firearms were displayed for sale. On these facts, the courts ordered forfeiture of the firearms and ammunition.

In the instant case, although the claimant did not display his entire assortment of firearms, he did maintain them all in his residence, from which he also operated an army surplus business. The fact that the claimant kept the entire assortment of firearms so accessible to his surplus showroom, that he repeatedly went into the non-public area of his residence to obtain the firearms he did display to government agents, the claimant's own statements, his course of dealing,

and the wealth of circumstantial evidence in the record prove by a preponderance of the evidence that he used or intended to use all of the firearms he personally possessed as an inventory to be drawn from in the course of dealing in firearms, in violation of 18 U.S.C. § 922(a)(1).

11. Consequently, this court concludes that the Government has proved by a preponderance of the evidence that, with the exception of those firearms labeled in claimant's criminal trial as Government's Exhibits 14, 24, 39, 59, 77, 78, 91, 97 and 109, the firearms here in question were involved in, used or intended to be used in violation of 18 U.S.C. § 922(a)(1). Such firearms are rendered subject to forfeiture under 18 U.S.C. § 924(d), which forfeiture is hereby ordered.

Those firearms identified as Government's Exhibits 14, 24, 39, 59, 77, 78, 91, 97 and 109 shall be returned to their owners as described in the fourteenth finding of fact set out above. These Exhibits are described by type and/or serial number as follows:

(1) Exhibit 14: Iver Johnson, 12 gauge single barrel shotgun, Champion Model, Serial Number—None. (The court notes that claimant described Exhibit 14 as a 16 gauge shotgun, when it apparently is in fact a 12 gauge. *Cf.* Exhibit 44, which is a 16 gauge Iver Johnson shotgun.)

(2) Exhibits 24 and 59: two Remington 22 caliber Mohawk rifles, Serial Nos. 2324414 and 2324420.

(3) Exhibit 39: Winchester 22 caliber Model 290 Rifle with scope, Serial No. 695087.

(4) Exhibit 77: Kurz 9mm backup Model Automatic Pistol, Serial No. A03183.

(5) Exhibit 78: Browning Sport King Model 22 long rifle automatic pistol, Serial No. 10466P69.

(6) Exhibit 91: Ruger carbine 44 magnum automatic rifle with scope, Serial No. 100-20563.

(7) Exhibit 97: Remington Fieldmaster 22 caliber pump rifle, Serial No. 153708.

(8) Exhibit 109; Harrington & Richardson 410 gauge shotgun, Model 158, Serial No. AF 3398.

AND IT IS SO ORDERED.

/s/ Charles E. Simons, Jr.
CHARLES E. SIMONS, JR.
United States District Judge

Aiken, South Carolina
December 26, 1980.

APPENDIX E

UNITED STATES DISTRICT COURT
D. SOUTH CAROLINA
COLUMBIA DIVISION

Civ. A. No. 77-590

UNITED STATES OF AMERICA, PLAINTIFF

v.

ONE ASSORTMENT OF 93 FIREARMS, DEFENDANT

Nov. 14, 1978

Glen E. Craig, Asst. U.S. Atty., Columbia, S.C., for plaintiff.

Herbert W. Louthian, Columbia, S.C., for Patrick M. Mulcahey, owner of property.

ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND PLAINTIFF'S MOTION TO STRIKE

HEMPHILL, District Judge.

This is a forfeiture action, originally filed March 31, 1977, and in which and by which plaintiff seeks condemnation as forfeited to the United States [1], and

---

[1] Under provisions of 26 U.S.C. § 7401, which provides: Authorization.

No civil action for the collection or recovery of taxes, or of any fine, penalty, or forfeiture, shall be commenced unless the Secretary or his delegate authorizes or sanctions the proceedings and the Attorney General or his delegate directs that the action be commenced.

a decree for the proper disposal thereof of 92 assorted firearms, as listed in an exhibit to the complaint, on the ground that "said firearms were had and possessed and used and intended to be used on January 20, 1977, and prior thereto by Patrick M. Mulcahey and Richland County, South Carolina, in violation of the laws of the United States by engaging in the business of a dealer in firearms and ammunition without the said Patrick M. Mulcahey having first applied for and received a license as a dealer in firearms * * *". In his answer, filed April 18, 1977, Mulcahey, first claimed ownership of the property described in the complaint and entered a general denial; for a second defense Mulcahey declared that he had been tried on the criminal side of the court, under the provisions of Chapter 44, Title 18, United States Code, in violation of Title 18, United States Code, §§ 922(a)(1) and 924(a) and thereafter acquitted by a verdict of a jury which rendered the issues before the court as *res judicata*, and collaterally estops the government from proceeding. A third defense alleges that the property was seized solely for the purpose of use of said property in evidence in a criminal proceeding and the criminal proceeding having been terminated, that plaintiff had no right to retain or condemn the property.

It is the last two defenses that plaintiff would strike, as positioned in its motion to strike, filed September 20, 1977. On November 9, 1977, defendant moved for summary judgment on the grounds that the owner had been acquitted in the criminal prosecution and that such criminal prosecution bars the forfeiture action. Therefore the motions involve the same issue, to wit: whether the admitted fact that the owner of the firearms was acquitted in a criminal prosecution

foreclosed the forfeiture action as pursued by the government. The complaint verifies the fact that plaintiff accuses Mulcahey of violation of 18 U.S.C. §§ 922(a)(1), 923(a), and 924(d). At the hearing on the motions it was admitted that the verdict in the criminal trial on these charges was not guilty. A recitation or finding of fact is unnecessary as the facts are not in dispute.

Initially, this court finds the complaint is lodged under the forfeiture provisions of 18 U.S.C. § 924(d) which states:

> Penalties.
>
> (d) Any firearm or ammunition involved in or used or intended to be used in, any violation of the provisions of this chapter or any rule or regulation promulgated thereunder, or any violation of any other criminal law of the United States, shall be subject to seizure and forfeiture and all provisions of the Internal Revenue Code of 1954 relating to the seizure, forfeiture, and disposition of firearms, as defined in section 5845(a) of that Code, shall, so far as applicable, extend to seizures and forfeitures under the provisions of this chapter.

It is to be noted that the section is not a criminal statute in term or in effect, but provides a civil penalty —forfeiture—for "any violation of the provisions of this chapter or any rule or regulation promulgated thereunder * * *." Such is the case before the court, a civil pursuit, as countenanced by the statute. A forfeiture proceeding is remedial in nature and is properly characterized as a civil proceeding. *Glup* v. *United States*, 523 F.2d 577, 561 (8th Cir. 1975); *One Lot Stones* v. *United States*, 409 U.S. 232, 237,

93 S.Ct. 489, 493, 34 L.Ed.2d 438, 443 (1972) citing *Helvering* v. *Mitchell*, 303 U.S. 391, 58 S.Ct. 630, 634, 82 L.Ed. 917 (1930).

In *Glup* the Eighth Circuit stated:

> Even assuming, arguendo that the criminal trial and the forfeiture involved some of the same firearms, the collateral estoppel doctrine, which is at the core of appellant's present contention, does not apply. The collateral estoppel effect of an acquittal on a forfeiture proceeding has been most recently addressed by the Supreme Court in *One Lot Emerald Cut Stones* v. *United States*, 409 U.S. 232, 93 S.Ct. 489, 34 L.Ed.2d 438 (1972). In that case, the owner of undeclared imports urged that his acquittal of charges of violating 18 U.S.C. § 545, was a defense to a forfeiture action instituted by the Government under the Tariff Act of 1930, 18 U.S.C. §§ 545, 597. The district court held that the forfeiture was barred by collateral estoppel and the fifth amendment. The Court of Appeals for the Fifth Circuit reversed. The Supreme Court granted certiorari and affirmed. Citing *Ashe* v. *Swenson*, 397 U.S. 436, 443, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970), the Court noted that "[c]ollateral estoppel would bar a forfeiture under § 1497 if, in the earlier criminal proceeding, the elements of a § 1497 forfeiture had been resolved against the Government." 409 U.S. at 234, 93 S.Ct. at 491. ***But the Court observed, acquittal on the criminal charge does not necessarily resolve the issues in the forfeiture action. The difference in the burden of proof in a criminal case and in a civil proceeding precludes application of the collateral estoppel doctrine.*** The Court stated:

> Moreover, the difference in the burden of proof in criminal and civil cases precludes application of the doctrine of collateral estoppel. The acquittal of the criminal charges may have only represented " 'an adjudication that the proof was not sufficient to overcome all reasonable doubt to the guilt of the accused'." As to the issues raised, it does not constitute an adjudication on the preponderance-of-the-evidence burden applicable in civil proceedings.

409 U.S. at 235, 93 S.Ct. at 492 (citations omitted). *It is well established that a forfeiture proceeding under 18 U.S.C. § 924(d) is remedial in nature and is properly characterized as a civil proceeding. Bramble* v. *Richardson*, 498 F.2d 968 (10th Cir. 1974); *United States* v. *One (1) 1969 Buick Riviera Automobile*, 493 F.2d 553, 554 (5th Cir. 1974); *Epps* v. *Bureau of Alcohol, Tobacco & Firearms*, 375 F.Supp. 345, 346 (E.D. Tenn. 1973); *United States* v. *1,922 Assorted Firearms*, 330 F.Supp. 635, 637 (E.D.Mo. 1971). (Emphasis added.) (p. 561.)

The reasoning in *One Lot Stones* is also applicable here:

> If for no other reason, the forfeiture is not barred by the Double Jeopardy Clause of the Fifth Amendment because it involves neither two criminal trials nor two criminal punishments "Congress may impose both a criminal and a civil sanction in respect to the same act or omission * * *" (Citing *Helvering* v. *Mitchell*, supra.)

An examination of the record here shows one criminal case, another civil. The difference in the criminal proceeding on the one hand and the forfeiture

proceeding on the other emphasizes the distinction here. The present action invokes the provisions of 26 U.S.C. § 5872(a)[2] and 26 U.S.C. § 7323(a).[3] The criminal action was not based on, neither included nor involved such sections.

This forfeiture action was properly brought under the provisions of 18 U.S.C. § 924(d) invoking the provisions of 26 U.S.C. § 5872(a) and 26 U.S.C. § 7323(a). This is an action *in rem* commenced by the Complaint for Forfeiture filed on March 31, 1977.[4] The court ordered (April 4, 1977) that Warrant for Arrest and Notice issue. The court obtained jurisdiction over the property by the Marshal arresting it and retaining custody thereof under the direction of the court. There is nothing in such statutes that requires the property be seized under a warrant specifically providing that it is seized for forfeiture.

---

[2] 26 U.S.C. § 5872(a) provides: Forfeitures.

(a) Laws applicable.—Any firearm involved in any violation of the provisions of this chapter shall be subject to seizure and forfeiture, and (except as provided in subsection (b)) all the provisions of internal revenue laws relating to searches, seizures, and forfeitures of unstamped articles are extended to and made to apply to the articles taxed under this chapter applies.

[3] 26 U.S.C. § 7323(a) provides: Judicial action to enforce forfeiture.

(a) Nature and venue.—The proceedings to enforce such forfeitures shall be in the nature of a proceeding in rem in the United States District Court for the district where such seizure is made.

[4] By orders dated July 6, 1977, the court ordered that the Complaint be amended to include an additional firearm and that warrant for arrest and notice issue in connection with such additional firearm. On July 18, 1977 Mulcahey filed an Answer to the Amended Complaint.

Where the property is lawfully seized as evidence in a criminal proceeding, it may be made the subject of a forfeiture proceeding under the provisions of 18 U.S.C. § 924(d), 26 U.S.C. §§ 5872(a), and 7323(a). It is clear that a claimant in a forfeiture proceeding is not entitled to the return of the defendant property on the ground he was acquitted in the related criminal proceeding. *Glup*, supra; *United States* v. *One 1969 Buick Riviera Automobile*, 493 F.2d 553 (5th Cir. 1974).

Of interest to this discussion is *Epps* v. *Bureau of Alcohol, Tobacco & Firearms*, 375 F.Supp. 345 (E.D. Tenn. 1973), affirmed without opinion, 495 F.2d 1373 (6th Cir.). There the court stated as follows:

> It is undisputed that the plaintiff did not, at the pertinent times, have a license to engage in the business of dealing in firearms and ammunition; but, he was acquitted of having violated the provisions of 18 U.S.C. § 922(a)(1) on November 7, 1972, in *United States of America, plaintiff* v. *William E. Epps, Jr., defendant*, criminal action no. 7260, this district and division. *Such acquittal on such criminal charge is not a bar to the civil administrative action by the government, which is remedial in nature, arising out of the same facts on which the criminal proceeding was based. Helvering* v. *Mitchell* (1938), 303 U.S. 391, 397, 58 S.Ct. 630, 32 L.Ed. 917, 921 (headnote 2). *Forfeiture of goods is a civil sanction, remedial in nature.* Ibid., 303 U.S. at 400, 82 L.Ed. at 922 (headnote 6); see also *Colavicco* v. *United States*, infra, [2 Cir.] 143 F.2d [410] at 411-412[2]. (Emphasis added.) (p. 346).

It is obvious the second defense is insufficient.

THE THIRD DEFENSE

In paragraph 9 of the complaint Mulcahey alleges that some of the appraised values of the firearms are not accurate and that the appraised total value is approximately one-third of the actual total value. This is not a valid defense.

The general statute (26 U.S.C. § 7323) providing for judicial action to enforce forfeiture does not require any appraisal of seized property. That statute is subject to the exception in 26 U.S.C. § 7325 providing that if the property is valued at $2,500 or less it will be appraised—as the claimant is entitled to judicial enforcement of the forfeiture where the property has a value of $2,500 or less if he files $250 cost bond. The regulations are in accord with the statutes in not applying the appraisement procedure set forth in 26 U.S.C. § 7325 where the property is alleged to have a value of over $2,500. Accordingly, where the property is alleged to have a value of over $2,500, the appraisal is jurisdictional only to the extent that it entitles the claimant to a judicial action without the requirement that he post a cost bond.

Since the Government's appraised value in this case is over $2,500 and is admitted to be so by Mulcahey in his Answer, any defect or inaccuracy in the appraisal is not jurisdictional and is immaterial to the prosecution of the forfeiture action. In other circumstances involving administrative forfeiture proceedings where the property was appraised at $2,500 or less, it has been held that a technical defect in the appraisal was not jurisdictional to the administrative forfeiture proceedings. *Glup*, supra. For an explanation of the reason for the requirements of appraisal and filing of a cost bond by the claimant where the property is valued at $2,500 or less, see *Epps*, supra;

and *Application of Colacicco*, 55 F. Supp. 766 (D.N.Y. 1943) affirmed 143 F.2d 410 (2d Cir. 1944).

In paragraph 10 Mulcahey alleges that many of the alleged items of property were not his property, but the property of his wife, children, and others.[5] This does not allege a valid defense to the forfeiture of any of the property. See *United States* v. *One 1972 Toyota Mark II*, 505 F.2d 1162 (8th Cir. 1974) where the Eighth Circuit stated as follows:

> The innocence, noninvolvement or lack of negligence of the owner in allowing the vehicle to be used for the forfeitable offense is no defense to the forfeiture action. *United States* v. *One 1971 Lincoln Continental Mark III*, 460 F.2d 273, 275 (8th Cir. 1972); *United States* v. *One 1967 Cadillac Coupe Eldorado*, 415 F.2d 647, 648 (9th Cir. 1969); *United States* v. *One 1961 Cadillac*, 337 F.2d 730, 732 (6th Cir. 1964); *cf. Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 94 S.Ct. 2080, 40 L.Ed.2d 452 (1974). (p. 1165)

In paragraph 11 Mulcahey alleges, in effect, that many of the seized items were "curios and relics" and not firearms within the meaning of Chapter 44, Title 18 U.S.C., and that such items should be eliminated from the forfeiture proceeding. This is a misinterpretation of the statutes and does not allege a defense to the forfeiture action.

---

[5] By order dated July 6, 1977 the court ordered that four of the firearms be delivered to Mrs. Mulcahey. Government counsel moved for such Order. No one except Mulcahey has filed a claim for any of the defendant firearms as required by the notice published in THE STATE newspaper dated April 29, 1977.

The provisions of 18 U.S.C. § 921(a)(13) and 27 CFR 178.11 defining certain firearms as "curios and relics" make it clear that firearms classified as "curios and relics" are "firearms" as defined in 18 U.S.C. § 921(a)(3)-(8). It is clear that the statute provides for certain firearms to be classified as "curios and relics" in order to create the category of licensee as a collector ((18 U.S.C. § 923(b)) who is a person "who acquires, holds, or disposes of firearms and ammunition as curios and relics" ((18 U.S.C. § 921(a)(13)).

An unlicensed person is not prohibited from collecting firearms generally or of the category of curios or relics. Additionally, an unlicensed person may only buy and sell firearms generally (including "curios and relics") within his own state, with certain exceptions, whereas if licensed as a collector who "acquires, holds, and disposes of firearms as curios and relics" he may acquire "curios and relics" anywhere and dispose of them to any licensee wherever located.

27 C.F.R. 178.41(d) makes it clear that a collector's license applies "only to transactions related to a collector's activity in acquiring, holding, or disposing of curios and relics" and such license does not authorize the collector licensee to acquire and dispose of curios and relics in engaging in the business of a dealer in firearms.

CONCLUSIONS

For the reasons stated above the court concludes that the motion to strike the second and third defenses is granted and that the defense motion for a summary judgment is denied. (The court schedules

a post-decision status hearing November 27, 1978, at 10:00 a.m. o'clock, at Columbia).

The Second and Third Defenses of the Answer are stricken. The Motion for Summary Judgment is denied.

AND IT IS SO ORDERED.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1983 [illegible] 1180

Office-Supreme Court, U.S.
FILED
APR 15 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1047

In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA, PETITIONER

v.

ONE ASSORTMENT OF 89 FIREARMS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI
FILED DECEMBER 20, 1982
CERTIORARI GRANTED FEBRUARY 22, 1983

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1047

UNITED STATES OF AMERICA, PETITIONER

v.

ONE ASSORTMENT OF 89 FIREARMS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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RELEVANT DOCKET ENTRIES

DATE	NR. VOL I	PROCEEDINGS
3-31-77	1	COMPLAINT FOR FORFEITURE
4-4-77	2	WARRANT FOR ARREST AND NOTICE
4-4-77	3	ORDER (RWH) that Warrant for Arrest and Notice issue. CC: USA, USM for svc (2).
4-13-77	—	USM RETURNS (2) of service of Complaint, Warrant and Order on Patrick M.Mulcahey on 4-5-77 in Cola., S.C. and on Assortment of 92 Firearms at Bureau of Alcohol, Tobacco and Firearms on 4-5-77 in Cola.
4-18-77	4	ANSWER of Patrick M. Mulcahey, owner of property, with Letter of Mailing
4-18-77	5	CL[illegible]M of property described in Complaint by Patri[illegible] M. Mulcahey with Letter of Mailing.
4-20-77	6	JURY [illegible]EMAND BY LETTER by Deft. Patrick M. Mulc[illegible]ey
5-11-77	—	USM RE[illegible]URN verification of Publication of Warrant For A[illegible]est & Notice.
6-24-77	7	INTERROGATORIES of Plt to def. w/cert. of svc.
6-29-77	8	MOTION To Amend Complaint, by plt w/cert. of svc. *(ref. 7–*
7-6-77	9	ORDER (RWH) granting plt's motion to amend complaint. 1cc to USM for service.
7-6-77	10	WARRANT FOR ARREST & NOTICE One copy to USM for Svc.
7-6-77	11	ORDER (RWH) that Warrant for Arrest & Notice issue for property added by amendment to original complaint 1 copy to USM w/Complaint for Forfeiture
7-6-77	12	ORDER (RWH) for four firearms to be delivered to Mrs. Patrick M. Mulcahey.
7-7-77	—	CERTIFICATE OF SERVICE of Order to Amend Complaint, Warrant For Arrest & Notice, and certified copy of Order For Arrest on def's counsel by Plt
7-12-77	—	USM RETURN service of Complaint, Motion, Order to Amend Complaint, Warrant For Arrest & Notice & Order For Arrest & Notice served 7-8-77 on the firearm described in motion at Bureau of AT&F
7-18-77	13	CLAIM OF PROPERTY DESCRIBED IN Complaint by Patrick M. Mulcahey, owner of property, by def w/ltr of mailing

7-18-77	14	ANSWER TO AMENDED COMPLAINT by Patrick M. Mulcahey, owner of property, with letter of service.
8-1-77	—	USM RETURN on delivery of the following weapons to Mrs. Patrick M. Mulcahey on 7-29-77: Winchester .22 cal. Model 190 Rifle; Remington .22 Cal. Rifle Mohawk SN 2324; Remington Mohawk .22 cal. Rifle SN 23244; and Kurz 9 mm Backup Model Automatic Pistol SN A03183
9-6-77	15	REQUESTS FOR ADMISSIONS to plt by Defs. w/letter of svc.
9-6-77	16	OBJECTIONS TO PLT'S INTERROGATORIES by defs. w/letter of svc.
9-12-77	17	MOTION by Plt to require answers to Interrogatories w/cert. of svc. *2-16-78*
9-12-77	—	MEMORANDUM (RECEIVED) of plt in support of motion w/CS
9-12-77	18	MOTION by Plt to strike from Answer, w/CS *(ref. 11-14-78)*
9-12-77	—	MEMORANDUM (RECEIVED) in support of plt's motion to strike w/cert. svc.
9-13-77	19	AFFIDAVIT of Carl M. Regal verification of publication
9-30-77	20	ANSWERS TO REQUESTS FOR ADMISSION by Plt w/cert. of svc.
11-9-77	—	MEMORANDUM (RECEIVED) of def. in opposition to plt's motion to require answer to interrog. w/ltr
11-9-77	21	MOTION For Summary Judgment by defs. w/ltr s *(ref. 11-14-78)*
11-9-77	—	MEMORANDUM (RECEIVED) of defs. in opposition to plt motion to strike and Memorandum in support of defs' motion for s/j w/ltr of svc.
11-22-77	—	MEMORANDUM (RECEIVED) by the pltf. in opposition to pltf's motion to strike & in opposition to defs' motion for s/j.
11-22-77	—	REPLY MEMORANDUM (RECEIVED) by pltf. as to memo. from def. in opposition to pltf's motion to require answer to int
11-22-77	22	MOTION by the pltf. for the court to require Patrick Mulcahey to make himself available for the taking of his deposition if the court concludes that he is not required to answer pltf's interr. *(ref. 2-15-78)*
11-22-77	—	MEMORANDUM (RECEIVED) by the pltf. in support of motion re: Patrick Mulcahey.
12-20-77	—	BAR MEETING (RWH/gg) Non-Jury roster not sounded.

2-15-78	23	ORDER (RWH) that Patrick M. Mulcahey make himself available for taking of his deposition. cc counsel.
2-16-78	24	ORDER (RWH) that plt's Motion To Require Ans. To Interrogatories dated Sept. 12, 1977—is granted. cc counsel
3-23-78	25	ANSWERS TO PLT'S INTERROGATORIES by Patrick M. Mulcahey, def w/cer svc
3-31-78	—	CANCELLATION OF HEARING S/J motion hearing scheduled 4-4-78 cancel at request of plt counsel due to involvement in SLED case State Court
9-29-78	—	PRETRIAL MEMORANDUM (RECEIVED) by pltf w/letter of svc
10-2-78	—	BAR MEETING (RWH/gg) For Trial. (2nd during 10/30/78 term)
10-2-78	—	MOTIONS HEARING (RWH/gg) Motions taken under advisement. Order to be filed within 10 days. (Court will certify for appeal)
10-2-78	26	NOTICE OF INTENT to Use Evidence, by Govt. (transcript of testimony of Kenneth E. Williford, deceased)
10-4-78	27	NOTICE OF OBJECTION to use of Evidence, by defs. w/ltr svc *(ref. 11-29-78)*
11-14-78	28	ORDER (RWH) that def's motion for summary judgment is denied and plt's motion to strike the second & third defenses of Answer is granted. (The court schedules a post-decision status hearing 11-27-78 at 10:00 a.m.) (MLD)
11-27-78	—	HEARING (RWH/gg) Arguments on Govt's. Notice of Intent to Use Evidence (fld. 10-2-78)—Court will allow evidence in. (Mr. Craig to submit proposed Order) Case to be set for Jury Trial at next term in Columbia.
11-29-78	29	ORDER (RWH) that def's objection to use of transcript of testimony of Kenneth E. Williford, deceased, is *denied*. (MLD)
1-[illegible]-79	30	NOTICE OF DEPOSITION by def. of David Whetstone w/ltr of svc
8-20-79	—	BAR MEETING (CES, JR/ln) Counsel advise no issue for jury. To be submitted on Briefs. 2 weeks for pltf to file brief. 1 Week thereafter for Reply Brief.
9-7-79	31	PETITION (REF: 9-7-79) by plft. for extension of time in which to file trial brief, w/cert. mailing.
9-7-79	32	ORDER (CESjr) the time within which pltf. must submit its brief is extended no later than 20 days after receipt by pltf. of transcript of the criminal action. eod 9-7-79. mld.

10-10-79	—	BRIEF (RECEIVED) by pltf.
1-24-80	—	BRIEF of claimant, w/ltr. of hand delivery on USA.
3-4-80		SUPPLEMENTAL BRIEF (RECEIVED) of claimant w/cert. mailing.
3-4-80	—	SUPPLEMENTAL BRIEF (RECEIVED) of claimant w/cert. mailing.
out of sequence		
9-15-80	—	PETITION (REF 9-15-80) by govt to supplement record w/cpy of transcript of CR 77-13 proceedings w/cert of svc.
9-15-80	—	TRANSCRIPT OF PROCEEDINGS (RECEIVED) supplied by govt to supplement record Vol. II
9-10-80	—	LETTER (RECEIVED) by deft. showing no obj to Petition filed 9-15-80
9-15-80	32	APPLICATION FOR DELIVERY OF GOODS by Adm of General Services, Stephen R. Durke Regional Counsel, Region 4, w/attachment for delivery of said items to Adm office, Bureau of Alcohol, Tobacco, and Firearms, Atlanta, Ga.
9-22-80	—	LETTER (RECEIVED) by dft. showing opp to Appl for deliv of goods to BATF
10-31-80	—	MOTION (REF 12-30-80) (RECEIVED) by deft. to restore case to jury calendar w/letter of mailing
12-30-80	—	TRANSCRIPT OF CRIMINAL ACTION filed and made part of the Record Vol. III.
12-30-80	34	BRIEF (FILED) of pltf. filed and made part of the Record
12-30-80	35	BRIEF (FILED) of claimant Patrick M. Mulcahey filed and made part of the Record.
12-30-80	36	SUPPLEMENTAL BRIEF (FILED) of claimant Patrick M. Mulcahey filed and made part of the Record.
12-30-80	37	ORDER (CES, JR) that w/the exception of those firearms labeled in claimants CR trial as exhibits 14, 24, 39, 59, 77, 78, 91, 97 and 109, are subj. to forfeiture under 18 U.S.C. § 924(d) forfeiture is hereby Ordered; that govt's exhibits 14, 24, 39, 59, 77, 78, 91, 97, and 109 shall be rtn to owner as described in ¶ 14 of this Order; that caption of action be changed from 93 to 89. MLD EOD 12-30-80
12-30-80	38	ORDER (CES,JR) denying claimants motion to restore action to the Jury Calendar, MLD EOD 12-30-80 JS6
1-7-81	39	MOTION by the claimant for stay pending appeal w/c. of svc.
1-7-81	—	MEMORANDUM (RECEIVED) By the claimant in support of its motion for stay pending appeal w/c. of svc.

1-7-81	40	NOTICE OF APPEAL by the claimant CC's to counsel, Court Reporter, 4CCA and Court (CES, JR.).
1-20-81	—	TRANSCRIPT PURCHASE ORDER (RECEIVED) By the claimant.
3-16-81	—	APPLICATION (RECEIVED) by GSA for delivery of seized property to New Mexico.
3-16-81	—	APPLICATION (RECEIVED) by GSA for delivery of seized property to Washington, DC
3-16-81	—	APPLICATION (RECEIVED) by GSA for delivery of seized property to Georgia
3-16-81	—	APPLICATION (RECEIVED) by GSA for delivery of seized property to Washington
3-16-81	—	APPLICATION (RECEIVED) by GSA for delivery of seized property to Maryland
3-16-81	—	APPLICATION (RECEIVED) by GSA for delivery of seized property to Washington, DC
4-15-81—		LETTER (RECEIVED) by plt. stating no objection to motion of claimant for stay pending appeal.
4-24-81	41	ORDER (CES, Jr) that pursuant To Rule 62(d) and FRAP Rule 8 order for judgment of 12-30-80 shall be stayed until determination of appeal; no superseadeas bond is required. (EOD 4-24-81) MLD.

COMPLAINT FOR FORFEITURE
(CIVIL No. 77-0590)

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Civil Action No.

UNITED STATES OF AMERICA, PLAINTIFF,

v.

ONE ASSORTMENT OF 92 FIREARMS, (SEE ATTACHED LIST)
DEFENDANTS.

COMPLAINT FOR FORFEITURE

The United States of America, Plaintiff, by its Counsel, the United States Attorney for the above-mentioned District, through this Complaint, in a civil cause of forfeiture for breach of the provisions of 18 U.S.C., Section 924(d), upon information and belief alleges as follows:

FIRST: That at all times hereinafter mentioned, Plaintiff was and is a sovereign power.

SECOND: That all and singular the allegations hereof are within the jurisdiction of the United States and of this Honorable Court.

THIRD: The commencement of this suit has been authorized, sanctioned, and directed in accordance with the provisions of 26 U.S.C. 7401.

FOURTH: Under the facts alleged herein and the provisions of the sections of the statutes of the United States enumerated herein, said property described in Paragraph Fifth below became and is forfeited to the United States.

FIFTH: That on January 20, 1977, Special Agents of the Bureau of Alcohol, Tobacco and Firearms, Treasury Department, did seize on land in Richland County, South Carolina, within the Judicial District of South Carolina, Columbia Division, as forfeited to the United States, certain property to wit: One Assortment of 92 Firearms (See Attached List) which property was used in violation of the

laws of the United States as alleged in paragraph Sixth hereof. Ever since said seizure said property has remained in the Judicial District of South Carolina in the custody of the Bureau of Alcohol, Tobacco and Firearms Office, 901 Sumter Street, Columbia, South Carolina. That at the time of said seizure said property was appraised at $5,507.00.

SIXTH: That said firearms were had and possessed and used and intended to be used on January 20, 1977, and prior thereto by Patrick M. Mulcahey in Richland County, South Carolina, in violation of the laws of the United States by engaging in the business of a dealer in firearms and ammunition without the said Patrick M. Mulcahey having first applied for and received a license as a dealer in firearms and ammunition as required by 18 U.S.C. 923(a); and said firearms having been used and intended to be used and involved in said unlicensed firearms business in violation of 18 U.S.C. 922(a)(1) and 923(a), thereby became forfeited to the United States under the provisions of 18 U.S.C. 924(d).

WHEREFORE: The United States, Plaintiff herein, prays that due process issue to bring said property within the jurisdiction of this Court by arrest and that notice issue to all parties in interest to appear upon the return day of such process and duly intervene herein by claim and plea in the premises; and due proceedings being had thereon, that for the cause aforesaid, the said property be condemned as forfeited to the United States and a decree for the proper disposal thereof be made.

THOMAS P. SIMPSON
United States Attorney

BY: GLEN E. CRAIG

GLEN E. CRAIG
Assistant United States Attorney
Attorneys for Plaintiff
151 United States Court House
Columbia, South Carolina 29201

MARCH 31, 1977

INDICTMENT
(Criminal No. 77-00013)

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Criminal Number 77-00013
18 USC 922(a)(1)
and 924(a)

UNITED STATES OF AMERICA

v.

PATRICK M. MULCAHEY

INDICTMENT

THE GRAND JURY CHARGES:

Beginning on or about the 12th day of May, 1976, to the return date of this Indictment, in the District of South Carolina, PATRICT M. MULCAHEY unlawfully and knowingly did engage in the business of dealing in firearms without being licensed to do so under the provisions of Chapter 44, Title 18, United States Code, in violation of Title 18, United States Code, Sections 922(a)(1) and 924(a).

A True Bill

FOREMAN

/s/ MARK W. DUYOK, JR.—EWR

United States Attorney

TRIAL TESTIMONY OF PATRICK M. MULCAHEY
(Criminal No. 77-00013)

[235] BY MR. LOUTHIAN:

Q Would you state your full name, Mr. Mulcahey?

A. Patrick Martin Mulcahey.

Q. Now, you are going to have to talk a little louder, Pat, so everybody can hear you.

A. Patrick Martin Mulcahey.

Q. Where do you live?

A. 1407 Woodlawn Avenue in Columbia.

Q. How long have you lived there?

A. About twelve years, I think.

Q. Are you married?

A. Yes, sir.

Q. Is your wife employed?

A. Yes, she works for the Post Office. She teaches people to work on these computers that they have.

Q. And do you have children?

A. Yes, sir, I have four.

Q. Are you engaged in any kind of business venture of your own?

A. Yes, I run a surplus business.

Q. What do you mean by surplus business?

A. Well, primarily military surplus but I also sell [235] camping equipment and books, too.

Q. Mr. Mulcahey, just generally tell the jury what kind of surplus business you are in, that is where you get your surplus materials and how you advertise them and how you sell them.

A. Well, most of my commercial surplus I get from wholesalers and the military surplus I get from wholesalers in North Carolina and Georgia. The government sells things in such big lots that I usually can't afford to buy directly from the government and I buy from the people that buy from the government.

Q. What types of things do you buy from these wholesalers?

A. Sleeping bags, field jackets, fire starting tablets, just—I think I have about four hundred items for sale.

Q. How do you advertise these items?

A. By mail order in the Shotgun News and other publications like that.

Q. Are you talking about sporting magazines and publications for sportsmen?

A. Yes.

Q. When you say Shotgun News, I guess that's a periodical that a lot of sportsmen read, is that right?

A. It's a newspaper that comes out every two weeks and it used to be primarily guns but it's kind of over the years [236] its kind of changed until it's surplus and things of that nature.

Q. What do you call your business, Pat?

A. PGS.

Q. What does that stand for?

A. Pat's Government Surplus.

Q. How long have you been in the government surplus business?

A. I think about nine years.

Q. And did you at one time have a federal firearms license?

A. Yes, I did.

Q. Do you know when you first got it? Or how long you kept it?

A. I think that I got the federal firearms license in 1966 and I had it through 1975.

Q. Were you selling and dealing in firearms during that period of time?

A. Well, yes, I was but it was not a—well, until the '68 gun law went into effect I sold guns at gun shows and—but after the '68 gun law went into effect it made it so you couldn't sell guns at gun shows. So that's when I started changing over to surplus.

Q. Did you find it profitable to continue to sell guns under the '68 Gun Control Act?

[237] A. Well, actually it's not really profitable at all to sell guns. There is not really that much markup on guns. I think Smith and Wessons have a 19 percent markup and Colt is about the same, and it's really not a big enough markup to make very much money at.

Q. Let me see if I understand you. If you buy a new Colt gun from the manufacturer for a hundred dollars, how much do you sell it for?

A. Well, it would sell for around a hundred and twenty dollars.

Q. And you considered that not enough of a profit margin to make any money?

A. No, it's not. You see, in a business you have to take all your expenses out of your profit and—well, like Sears and Roebuck works on a 38 percent profit margin gross, and I think they end up with about two percent profit.

Q. I see. Where do you operate your surplus business, Pat?

A. Out of my home.

Q. And do you have any signs or anything outside your house indicating what kind of business you are in?

A. No, my business is primarily mail order and I have a bad storage problem and then I'm having, I have to all the time keep large quantities of boxes on hand of various sizes to send out the orders in, and it's just, I just prefer to [238] sell things mailorder.

Q. Now, tell us a little bit about the profit in the surplus business. How does that compare with the profit in the gun business?

A. The profit in the surplus business is very good. You—it's not difficult at all to make a fifty percent profit which is doubling your money. And I sell some items that I quadruple my money on. There's quite a bit of—it varies from item to item and even from time to time that you purchase the same item.

Q. You told us that you buy by mail. Do you sell mostly by mail?

A. Yes. I'm almost, I would say probably 95 percent mailorder, maybe more. The people that come by are usually friends of mine and they will come by and buy something and will talk for a while, and occasionally another wholesale dealer will come by and buy or sell some things to me.

Q. Now, Pat, let me hand you this picture which is government's exhibit 110, and ask you if that is part of your surplus business in your home?

A. Well, it's part of the surplus business and it's also the boxes that I have to keep. It's piles of boxes there and piles of boxes there, because, you know, I'm always short of boxes.

Q. All right, now, where else do you advertise besides [239] the Shotgun News?

A. Shooting Times. I have advertised in Illinois Outdoors, Gunweek, Vigilanti Magazine, Soldier of Fortune Magazine.

Q. What do you typically advertise in these magazines?

A. Mountain climbing and rapelling rope, sleeping bags, jungle fatigues, field jackets, triox and heating bars, things of this nature.

Q. Do you advertise any firearms?

A. No.

Q. Have you advertised any firearms since your license was terminated back in '75?

A. No, no, I haven't. Last year, I believe, I spent somewhere over two thousand dollars on advertising, and—no, that was in '75, and in '76 I believe I spent over twenty-four hundred dollars in advertising, and there was no firearms advertised.

Q. Are you listed in the newspaper, local newspaper, as having any kind of business, a local ad?

A. No. If you do that then people start coming by and mailorder takes a lot of time because there is a lot of correspondence plus putting things in boxes and taking them to the Post Office, and I would prefer just to deal through the mail.

Q. Do you have any advertising in the telephone [240] directory of your business?

A. No, no, I don't.

Q. Do you have a listing for your business in the telephone directory?

A. No, I don't.

Q. Now, Mr. Mulcahey, you were in your home on January 20th of this year when the agent came and took these guns from your house, were you not?

A. Yes, sir.

Q. And could you come down here and point out to the jury whether or not these guns, or any of them, belong to other members of your family?

A. Yes, sir.

Q. Okay.

A. This belongs . . .

Q. We will have to refer to this by exhibit number to keep the record straight. This is government's exhibit number 14 which looks like an old single-barrel shotgun.

A. This is my oldest little boy, his 16 gauge. His grandmama gave that to him.

Q. How old is your boy?

A. Twelve. This belongs to one of my girls. They each have one, so there should be another one.

Q. This is government's exhibit number 59 which appears to be a .22 caliber semi-automatic.

[241] A. Lugar 66. One of them belongs to my oldest girl and one of them belongs to my younger girl.

Q. All right, this other one is exhibit number 24. These are identical, I believe.

Q. This belongs to my oldest boy.

Q. This is government's exhibit number 91 which is what kind of a gun?

A. It's a Luger 44 magnum, semi-automatic.

Q. With a scope?

A. With a scope.

MR. RUSCHKY: I'm sorry, Mr. Louthian, whose gun was that?

MR. LOUTHIAN: The oldest boy.

A. This belongs to my younger boy—no, I'm sorry, that's not right. This belongs to my youngest boy.

Q. This is government exhibit number 39. It belongs to your youngest son?

A. Yes, sir.

Q. What kind of gun is this?

A. .22 rifle, Winchester.

Q. With a scope?

A. Yes, sir.

Q. You say it was a Christmas present?

A. Yes, sir.

Q. When was that?

[242] A. Last year.

Q. Was the stock broken when you saw it last?

A. No, it wasn't.

Q. Was it broken on the 20th?

A. I don't know when it was broken. It was not broken the last time I saw it.

Q. And it's one year old?

A. Yes. This belongs to my youngest little boy. It's a 410.

Q. Government exhibit number 109 is a single barrel 410 shotgun that belongs to your son?

A. And this belongs to my oldest boy. This is his .22 rifle. His grandfather gave him that.

Q. Exhibit number 97 which is a .22 pump rifle. You say it belongs to which son?

A. My oldest son.

Q. And where did he get it?

A. His grandfather gave it to him.

Q. How long ago?

A. Well, his grandfather gave it to me to keep until he was old enough to get it. I don't think he was but about four or five when he—when my father gave it to me and said when my little boy was old enough that he would, he should get it.

Q. It was owned by your father, then, as I understand [243] it?

A. Yes, sir.

Q. It appears that there is something wrong with the slide. Is that . . .

Q. The screw has come out sometime since it left my house. I believe that is the extent of everything that belongs to my children.

Q. Are there any guns here other than these that have been in your family for a long period of time?

A. This belongs to my wife. She signed for that.

Q. All right, this is government's exhibit number 77?

A. Yes.

Q. Which is a .38 nine millimeter backup automatic pistol.

A. There is a .22 pistol here someplace. This belongs to my wife.

Q. This is government's exhibit number 78 which is a .22 pistol, a Browning automatic?

A. Yes.

Q. And that belongs to your wife?

A. Yes, sir.

Q. And there are other guns out here that have been owned by either you or members of your family for a long period of time?

A. Yes, sir, there is a 410 single-barrel shotgun that [244] my grandfather gave me when I was 11 years old.

Q. Is that out here?

A. Yes, sir, it ought to be out there someplace.

Q. All right, sir, let's see if we can find it. This looks like a 410 breakdown single-barrel.

A. Yes, I believe that's it, yes, sir.

Q. This is government's exhibit number 96. You say your grandfather gave it to you when you were 11 years old?

A. Yes, sir.

Q. Have you owned it continuously since then?

A. Yes, sir.

Q. Anything else?

A. I have—there is a .22 caliber High Standard pistol with, it's got white grips on it. No, that's a newer one. It's a very old looking—yes, that. My father gave me that when I was 15 or 16. I can't remember which.

Q. This is government's exhibit number 75?

A. Yes, sir.

Q. And you have owned that since you were 15 or 16?

A. Yes, sir.

Q. Anything else?

A. The first handgun I ever purchased is the Polish gun that the man said was a curio. I don't know.

Q. Can you see it from up there without getting down?

A. Yes, sir, it's right in front of Mr. Holland and [245] it's got black grips—no, close to—you are almost leaning on it. No, you are almost leaning on it.

Q. This? Government's exhibit number 79?

A. Yes.

Q. This is the first handgun you ever owned?

A. Yes, I bought that for $15.00.

Q. When did you buy it?

A. 1958 or '59. It's been a long time ago. I have had it more than half my life.I was still in high school when I bought it.

Q. Anything else you can think of, Pat?

A. I've got a M-1 rifle over there that I bought, I think when I was 18 years old. It's closer to—back the other way—right there.

Q. Here it is. This is the old M-1 that you ran?

A. Yes.

Q. World War II model?

A. Yes, sir.

Q. Government's exhibit 26. And when did you get that?

A. I think I was, I think I was 17.

Q. Can you think of any others?

A. I don't really know. The browning high power that is there someplace, I have had. My father gave me that, I think, twelve yars ago.

Q. Can you point it out down here?

[246] A. Yes, it's behind the little box. I believe that's it.

Q. Does this look like it?

A. Yes, that's it, and . . .

Q. Government's exhibit number 83.

A. And there's—I'm sure there is, you know, other ones that I just can't think of.

Q. Well, it might come to you later. Let me ask you this, Pat, when did you first get interested in guns as a hobby?

A. Well, I guess I was about 15 when I first, I got a job for two days and went down to Sears and they had a damaged .22 rifle and I bought it. That was the first one I ever bought, and then . . .

Q. State whether or not you have been collecting guns since that time?

A. Yes, I have been collecting them and trying to build up a nice collection and I think I have a real nice collection—had, I don't now.

Q. This is the last one I'm going to ask you about right now, Pat, but this is government's exhibit number 15. What is that?

A. That's a Centinnel '66. It was put out on the hundredth anniversary of Winchester Arms Company and that's supposedly real gold plating on there. I think maybe it was [247] because gold was a lot cheaper back then.

Q. Do you know when you bought it?

A. I traded a fellow another rifle for that rifle. It was not too long ago.

Q. Does that have any use as a hunting weapon or sportsman's weapon?

A. I guess you could take out in the woods if you wanted to. It's kind of pretty to be, you know, beating around in the bushes with.

Q. All right, Pat, I'm going to call your attention now to May of 1976, and ask you whether or not at that time you had a license to be a firearms dealer?

A. In May of 1966?

Q. No, last May.

A. No, sir.

Q. All right, now, did anyone approach you about buying some guns from you? If so, who was it?

A. I—this fellow, Mr. Kenneth Williford, one afternoon he come to my door and knocked on the door and said that he had heard that I was a gun collector and that I had some guns that I might want to trade him or sell.

Q. Did he tell you what kind of business he was in, if any?

A. He told me that he was, that he was a disabled person; that he had been disabled about five years previously [248] in an accident at the Savannah River Project; that he was a crane operator foreman, I believe, and that he had gotten his leg hurt and that he was collecting Social Security benefits; that this was all the money that he had and he went into a long story about how Charlie Daniels, which the construction company had beaten him out of any kind of a

settlement in some way and that—well, all of this, you know, this, I mean he introduced himself first and then he, you know, started talking and he brought in this Enforcer pistol with him that he told me that he might want to trade or even sell. And I was interested in it. I had never owned one and I have wanted one. And he—anyway, we talked for about an hour or an hour and a half.

Q. And did he identify himself as a gun collector or having any knowledge about guns?

A. Yes, he did. He told me that he collected them when he could but that he didn't, he was not, he didn't really have the money to collect them any more and that he would usually buy them and keep them for a little while or buy them knowing there was someone else willing to, that he could sell it to, and that he would, that's why he bought them.

Q. Did he ask you whether you had any guns for sale?

A. Yes, he did. He asked me if I had any that I wanted to sell.

Q. Now, let me ask you this, Pat, because it's very [249] important. Who made the first mention of buying or selling guns?

A. Oh, he did. I mean he—I was back in the back of the house packing up packages and he knocked on the front door and I opened the front door and there he was, and he did, I mean I . . .

Q. Had you ever seen him before or heard of him?

A. No, no, I had not.

Q. Now, did you make any transaction or did he buy anything from you at that time?

A. His first visit, as near as I can remember—now, it's been almost a year, but as near as I can remember he came to see me six or seven times in all, and on his first occasion that he came he asked me if I had some firearms that I did not, you know, that I was willing to sell, and I told him that I had some that I didn't particularly want and that what I preferred to do, what I wanted to do instead of selling them was to trade it for his Enforcer pistol. And I showed him several and I said, "There are several of them here that we could work out a trade on."

Q. Who first mentioned the Enforcer? Did you tell him you were looking for one or did he tell you he had one?

A. No, he brought it with him into the house. Now, I don't think he brought it initially to the door. No, he didn't bring it initially to the door. He came to the door [250] and he came in and we talked for 15 or 20 minutes about, you know, general guns and collecting and things like this, and he said that he had something in his car that he bet I would be interested in. And at that time he went back out to his car and he came back with the Enforcer pistol.

Q. Is an Enforcer hard to get? Are they rare?

A. No, not especially. Well, they are not a very common weapon. They are, I imagine that you could get a dealer to order you one, but there are not many of them around.

Q. Okay. Well, on that first visit do you know whether or not he bought this gun, or a gun?

A. No, he didn't buy anything his first visit. He told me that he would have to come back the next week because he was not, he did not have any money; that he was, that he would have to get up the money to buy it. And I said, "That's fine, it's not going anywhere." And, you know, "If you want it."

Q. Did he express interest in a particular gun?

A. Not in a particular gun. He told me he was looking for a 357 magnum with a short barrel, and I had that Lugar 357.

Q. Did you show it to him?

A. Yes, I did.

Q. Now, did anything else of significance happen that [251] time?

A. Well, we just talked for about an hour and he asked me about, he asked me if I had any quantity of guns that I wanted to sell. I told him that I didn't, and he told me that he had two friends of his from up North that would come down and pick up guns if I wanted, if I had any number of them to sell. And I told him that, I told him, "I don't have that many guns that I want to sell, that I want to get rid of, and on top of that that's against the law. You can't"—you see, my whole impression of him was that he was not a very

well educated person and that he had kind of fallen onto hard times and he was looking for a way to make ends meet, which he told me his wife had diabetes. Later he told me he had diabetes. He told me that the only thing he got from, was just a small Social Security pension and that he needed to make, he needed to make some money to pay for his wife's doctor bills and he, but it was, I got the impression that he was ignorant of the law and I was, I told him that you cannot sell guns to out-of-state residents, that this is a violation of the law. And he also asked me if I knew where he could get an AK-47.

Q. What does an AK-47 mean?

A. Well, it's a Soviet designed rifle. It's an assault rifle and it has a selector switch on it so that it can be fired full automatic. It's primarily a semi-automatic [252] weapon but it does have a selector switch.

Q. What did you tell him when he asked for an AK-47?

A. Well, I told him that an AK-47 had a selector switch on it which made it classified as a machine gun and that was something he certainly didn't want to get into because the ATF was really hot on machine guns and if they caught him he would do time. And that was almost my exact words.

Q. What else did you all talk about on any of these several visits?

A. Well, it's, he asked me one time if I knew where he could get any explosives and I told him that, I told him, "Sure," I knew where he could get explosives. He's got a farm. Go down across from the Horseshoe to the Federal Building, buy a license, I think it costs a dollar, and he can buy all the dynamite he wants.

Q. Did he want you to get explosives for him?

A. Well, no, he didn't ask me directly if I had any explosives. He asked me did I know anybody that had any. That was not really couched in a, "Do you have some that you want to sell?"

Q. What else did you talk about?

A. Well, he told me a lot about himself. I think on the third visit he told me that he was fighting with the Veterans Administration, that he had spent a long time in the Army and that he had become disabled in some way. It

[253] was through some service-connected disability and that he had, because, you know, his whole, what he actually said was that he had served in the Army for a long time and he made one mistake which was he got mad at a Captain and beat him up and that the Army, that they kicked him out of the Army because of that and that he didn't think that was fair because his disability was service-connected. I think he . . .

Q. Was there a later discussion about his discharge from the Army?

A. Yes, there was on his third visit. On his third visit he told me that he wanted to buy a model 39 Smith and Wesson pistol and I had one. In fact, I had two and I told him that I would probably, you know, I would want to sell one. I didn't especially want both of them. And he—I got it for him, he looked at it and he said, "Could you put this aside for me until next week when I have some money?" and I said, "Sure", you know, "that's fine." And so then we went on talking and it was at this time that he told me that he had been kicked out of the Army for beating up a Captain. And I didn't think anything of it at the time, but later it occurred to me that if he was dishonorably discharged that he was not eligible to buy a weapon, and the next time he came back, which—excuse me, that wasn't the third time, I think that was the fifth time that he came. The third time that he came I believe he bought the Tarus. That was the [254] fourth time. That was the fourth time he came, I believe, that he said that he would like to buy the Smith and Wesson next week, and anyway I thought about it and the next week when he came I asked him, I said, I asked him, "Did you tell me that you had been dishonorably discharged from the Army?" And he said, he said, "No." and I said, "Well, you told me you were kicked out of the Army last week when you came by." And he said, "Well, you must have misunderstood or made a mistake, or, you know, but I didn't tell you that."And I said, "Well, I'm sure you did, and you are going to have to, what I want you to do is to fill out one of these yellow forms for me because if you are dishonorably discharged you are not eligible to buy a gun and I have to"—I explained to him, I said, "You have

to fill these questions out at the top and you have to put down the proper answer for each one of these questions, and if you have been dishonorably discharged you will have to answer yes and then I'm not going to sell you anything, and you had better answer them truthfully because I'm going to keep that piece of yellow paper with my records, you know, with my papers and if anybody should ever come to me about having sold you a gun I'm going to produce that as proof that I sold it in good faith", and that he lied in order to purchase a weapon, and ...

Q. You are referring to government's exhibit number 111, form 4473?

[255] A. Yes, that's right.

Q. Did you require him to identify himself by any means on that form?

A. Yes, his driver's license. The number is down here.

Q. And is that when you sold him this gun, this model 39?

A. Yes, that's right

Q. Government exhibit number 4?

A. Yes.

Q. That was after he signed the form?

A. Yes, this was a peculiar incident, because when I asked him to sign the form there was this kind of long silence and he got really, he got really angry at me for asking him to sign the form, and he just stood there, I guess for about a half a minute and just, you know, he was very aggravated about me asking him to sign the form, and his friend, George, who he introduced as his cousin, after about, after a while of this silence it got kind of embarrassing and he said, "Go ahead and sign it, Whitey." And so then Mr. Williford filled out, answered the questions and signed his name and I put, I asked him for his driver's license and put his name and address at the top and his driver's license number down in the little space that's made for it, and ...

Q. Was there any discussion between you and George [256] about George having been convicted of shoplifting?

A. Yes, George told me, he was standing there kind of, he had kind of an embarrassed grin on his face and he kind

of stood there and he said, "Well, you know I can't sign for the gun because, you know, well, you know." And I said, "Why can't you sign for the gun?" And he said, "Well, because I have been convicted of a crime that carries over a one-year sentence." And I said, "Well, what have you been convicted for?" and he said, "Shoplifting." And, you know, I said, "Well, I didn't know shoplifting carried a one-year sentence." And he told me, I think he said that he used to live in Georgia and in Georgia it did, or something like that. That's not exact, you know.

Q. Now, Pat, on the total number of visits that Whitey and George came to see you, I believe you sold them three guns?

A. That's right.

Q. That's government's exhibit number 4, number 3 and number 2. Now, how long did it take Whitey to buy that first gun from you? Include all the visits and whole time to the best of your recollection.

A. Well, he came by, he came by one week, the first time he came by and he stayed probably about an hour and a half, and we mostly just talked and he saw the gun and he said that he liked it and that if I would, you know, if I [257] would put it aside he would come back next week. And the next week he came back and he, he would, I think he stayed about an hour that time and we talked a lot and he bought the gun, he paid me the money for it, and . . .

Q. Who paid you for it?

A. Mr. Williford.

Q. How much did he pay you?

A. One hundred and thirty dollars ($130.00).

Q. Did you make any profit at that price?

A. I don't really, I don't really think I did. I'm not—if I remember properly that was just about what I had in it. I'm not—I had bought the thing, I had been attracted to the gun and it just, it looked a lot better than it was. It wasn't really something that I felt like keeping.

Q. Now, when he bought the second gun how much time did he take with you before you sold it to him?

A. Well, I guess, I guess that would be on, I think, his third visit and I believe that he spent about forty-five minutes there, maybe, right around forty-five minutes.

Q. That's when you sold him the Tarus?

A. Yes, yes.

Q. Who put the price on it?

A. As near as I can remember, it was him that put the price on it.

[258] Q. What kind of price did he want to pay you?

A. Well, he offered me ninety dollars ($90.00) for it.

Q. How much is it worth?

A. I guess it's worth right around ninety dollars.

Q. Now, when you sold him the nine millimeter Smith, the automatic, how much time did you spend with him before you agreed to sell him that gun?

A. Well, he came, he came on a fourth visit and he looked at the gun and we talked, I guess for about somewhere between a half an hour and an hour and we talked and he, he was, he told me that he had sold the Tarus revolver that he had bought the previous week and that he had sold it for a hundred and twenty dollars and that he was, you know, that the money really came in handy and that his wife was ill and he was real happy about it.

Q. That's the one he paid you ninety dollars for?

A. Yes.

Q. He said he sold it for a hundred and twenty?

A. Yes, that's what he told me.

Q. All right, go ahead.

A. And that he was looking for a nine millimeter Smith and Wesson Automatic. He described it in some detail. I knew what he was talking about right away but he went on to say that it was double-action and you didn't have to cock it, it would work like a revolver, you could cock it and fire it [259] or you could just pull the trigger. And I said yes, that I had two of them and that I had thought I would probably sell one, and he asked me if he could look at it and I showed it to him and he said that that's good, that's just what he wanted and he would be back next week with the money. And on the, I believe that was his fifth trip and the next week is when he came back and purchased it.

Q. During all of these contacts with Mr. Williford or Mr. Ferguson, did you ever make any effort to contact either of them, that is did they leave a telephone number or an address or any place and ask you to contact them?

A. Mr. Williford left his phone number and asked me to call him if I wanted, if I ran across anything good that he thought he could make money on.

Q. Did you ever call him?

A. No, I didn't.

Q. All right, now, did you ever have any contact with either of these people at any place other than your home?

A. No, I didn't.

Q. Did you ever ask them to come to your home or come back to see you?

A. No, no, I didn't.

Q. Now, did you hear from either of these people between May 26th or 1976 and January 13th of 1977?

A. No, I didn't. I got the, I got the impression that [260] Mr. Williford became, that Mr. Williford got mad at me because I asked him to sign that yellow form.

Q. All right.

A. And . . .

Q. Did you make any contact or effort to call him or contact him during that several months period?

A. No, I did not.

Q. On January 13th did Mr. Williford and Mr. Embree come to your house?

A. Yes, they did.

Q. All right, now. How long did they stay?

A. Well, they didn't stay very long at all. They both came in and Mr. Williford was, he asked me did I still have the other model 39 Smith and Wesson that I wanted, that I had when I sold him that one, and I told him yes, I still did have it. And he said, "Well, have you considered selling it yet?" And I told him, "Well, yes, I would probably sell it." And so he said, "Well, that's good. We'll come back next week with the money." And he didn't really stay very long at all, and as he was, there was these two Springfield rifles and a shotgun leaning in the corner, and he said, "Those Springfield rifles look, they are real nice Springfields." I

said, "Yes, they are, they are both almost mint. They are real fine Springfields." And he said, "Well, are they for sale?" And I said, "Well, I want to sell, [261] I want to sell one of them and, but I haven't decided which one yet." And he said, he said that he knew a doctor down in Olar that had been looking for one. I said, "Well, the one has never been fired and the other one has been fired a little but it's got the pistol grip stock on it, and that makes it, that stock is rarer and it's more, it's better with that stock on it." And so he said, "Well, would you consider selling both of them?" And I said, "Well, yes, I would." And he said, "Well, do you want to sell that shotgun, too? That shotgun looks good." And I said, "No, I can't sell that shotgun. A friend of mine brought the shotgun so that I could take it to another friend of mine so he could put a front sight on it." And so I—and he said, "But all of these guns are for sale?" And he pointed to the two Springfield rifles and there was a, there was also something else there, I believe it was a .22 magnum bolt action rifle there, and he said, "All of these guns are for sale?" And I said, "Yes." And he had seen the .22 magnum bolt action rifle all of his previous visits. It had just kind of become a fixture there in the corner.

Q. When he said, "All of these guns are for sale", how many guns was he talking about?

A. I think there was three of them excluding the shotgun which didn't belong to me and I couldn't sell it.

Q. Did you ever tell anybody that everything you have [262] is for sale, or all of your guns are for sale?

A. No, that's that's a ridiculous statement. I have got guns that people have offered me outrageous amounts of money for and I wouldn't sell them. That Johnson semiautomatic rifle over there I was offered five hundred and seventy-five dollars ($575.00) for it one time and it just, you know, I have had some of these things and I have built up over the years a collection of having almost everything that I wanted in the way of guns, and . . .

Q. Was there any discussion about the AK-47 automatic weapon on that last visit in January of this year?

A. Yes, he asked me did I know where he could get a barrel for one,and I said . . .

Q. Who is he?

A. Mr. Williford, I'm sorry, asked me did I know where he could get a barrel for me and I said, "Your best bet would be to look at Shotgun News, that Sherwood Industries or probably somebody like that that sells bunches of parts that, you know, that are parts dealers specializing in selling parts, that they might have one." But I didn't know of any barrels, I mean.

Q. Did he—state whether or not he told you that he had bought one, an AK-47?

A. Yes. He told me he had purchased one and that he paid five hundred dollars ($500.00) for it.

[263] Q. That is the same kind of weapon he tried to get you to sell him?

A. Yes.

Q. Pat, in any of these discussions was there any mention made about dope or liquor or any other illegal activities?

A. Well, he told me that he used to be a moonshiner and that he, you know, which a lot of people down there used to be, you know.

Q. Down around Olar?

A. Yeah, it's not really so much of a thing down there and that, and that he knew, you know, that he knew some people that I could trade some moonshine for guns, and I told him that I wasn't interested, that I wasn't really a drinker and if I was going to drink I was not going to drink moonshine. And so then he asked me another time, he asked me was there any, did I, did I smoke dope, and I told him that I had, I had smoked dope one time and it gave me a terrible stomach ache and that since then I had never, you know, I wasn't the least bit interested in anything like that. He said, "Well, I know some people that will trade dope for guns." And, you know, I just said, "Well, I'm not really interested," and . . .

MR. LOUTHIAN: I believe that's all I have, Pat, at this time. Would you answer any questions Mr. [264] Ruschky might have for you?

CROSS EXAMINATION:

BY MR. RUSCHKY:

Q. Mr. Mulcahey, that Pat's Government Surplus that you operate, is that all you do as far as a livelihood? Do you have any other source of income?

A. No, no, that's my source of income.

Q. Of course, your wife works for the Post Office?

A. Yes, sir.

Q. Mr. Mulcahey, when Kenneth Williford came to you, let's see, is it your testimony that he visited you four times in May?

A. I don't know exactly when it was.

Q. Well, let's do it this way. The first time he visited you he didn't buy anything?

A. That's right.

Q. The second time he purchased this Lugar?

A. That's right.

Q. That was the second time?

A. That's right.

Q. Government exhibit 2?

A. That's right.

Q. The third time he visited you he purchased the Tarus which is government's exhibit 3?

A. That's correct.

[265] Q. And the fourth time he came . . .

A. No, the fourth time he didn't purchase anything. The fifth time he came he purchased that piece right there.

Q. All right, the fifth time he purchased government's exhibit 4?

A. That's right.

Q. And then, of course, the sixth visit was in January?

A. That's right.

Q. A couple of months ago?

A. That's right.

Q. Was it your impression that he was trying to buy illegal weapons?

A. (No audible answer.)

Q. He was asking for machine guns, wasn't he?

A. He asked about them, yes, sir. It was my impression that he was—what my impression was was that he was, he was down on his luck, hard up, and he was looking for some way to make money. That's what my impression was.

Q. And he could make money by procuring anywhere he could an automatic weapon?

A. I guess so.

Q. All right. You testified that he made reference to friends or connections or somebody from up North who would be willing to come down here and purchase weapons?

[266] A. Yes, sir.

Q. That occurred to you to be illegal activity?

A. I told him at the time that that was. I did not, as I have said before, he was not, he did not impress me as a person that, he impressed me as a person that was ignorant of the possible repercussions of what he had planned.

Q. All right, but it was clear to you what he was trying to do. He was trying to buy an automatic weapon, or he was trying to supply guns to people up North?

A. (No audible answer.)

Q. Is that right? You understood what he was trying to do, and you tried to explain to him that it was against the law?

A. Yes.

Q. Is that a fair statement?

A. Well, I don't know if it's exactly fair or not. I told him that, that he—he did not definitely say that he was involved in these acts. He said that he was, that he was, if he could get it together he would become involved in these acts; that if he could find somebody with an AK-47 he could sell that AK-47 to another somebody.

Q. Okay. You knew from your experience as a federally licensed firearms dealer that all of what he was talking about was illegal, isn't that right?

A. Yes, sir.

[267] Q. That is why . . .

A. I told him that it was.

Q. You tried to caution him about that?

A. Yes, sir.

Q. Did it occur to you to call ATF and tell them about someone had just been to your residence inquiring about guns and automatic weapons and friends up North and talking like trying to be a trafficker in firearms?

A. No, it didn't.

Q. Why not?

A. Ah—I felt sorry for the guy. He came on with a whole song and dance about his impoverishment, his being screwed over by the Army, being screwed over by Charlie Daniels . . .

Q. Now, wait a minute, the Army didn't come out until the fourth visit, did it?

MR. LOUTHIAN: Your Honor, let him finish his answer, please.

THE COURT: Give him a chance to finish his answer.

A. I tell you the truth, I don't know. I'm telling you my general impression of the man. I don't know if that came out in the first visit. I think you are probably right, I think it probably did come out in the fourth visit, but I'm telling you my general impression of the man.

[268] Q. All right. Well, I think we understand your general impression. What I want to know if why you didn't call ATF, and it was just because you felt sorry for him?

A. I didn't want to cause him any trouble. He, according to him he had had more than his share.

Q. But you are aware, are you not, that Congress was concerned about the widespread traffic in firearms and that's why they passed this law. And here's a man inquiring about that and you don't bother to call the authorities? That is true, isn't it?

A. He did not, he did not—yeah, I guess. He told me that if I had some guns that I wanted to sell that he knew some people from up North that would come down and buy them. That's what he told me. So, does that answer your question?

Q. No, sir, it doesn't. It didn't occur to you to call ATF and say someone has just been here who says he has connections up North. I want to report him to you. Maybe even ATF would have asked you to cooperate with him so that they could have found these connections up North. It didn't occur to you, did it?

A. No, it didn't.

Q. All right.Mr. Mulcahey, have you ever referred to the ATF as the gestapo?

A. Yes.

[269] Q. Is that the way you feel about them?

A. Yes.

Q. What about these explosives Mr. Williford asked you if you knew where he could get explosives?

A. I told him where he could get explosives?

Q. Okay. Now, does a person having explosives or dealing in explosives have to have a license from ATF just like firearms?

A. I believe so. I believe you have to go down and buy, across from the Horseshoe at the University, you have to go and buy a license.

Q. All right. You are dropping your voice, Mr. Mulcahey.

A. My throat is getting kind of dry.

Q. Would you like some water?

A. That would be appreciated. Thank you.

Q. Now, it is your understanding that one who has explosives has to have a license?

A. That's right, yes.

Q. Have you ever had a license to have explosives like you had a license for firearms?

A. No, I haven't.

Q. All right, now, have you ever had explosives?

A. Explosives . . .

MR. LOUTHIAN: Your Honor, I object to this.

[270] THE COURT: Beg your pardon?

MR. LOUTHIAN: I object to the questions, Your Honor.

THE COURT: I'm sorry, my attention was diverted elsewhere. What was the question?

MR. RUSCHKY: Your Honor, the question was, I asked him if he had ever had an explosives license, and he said no. I asked if he had ever had any explosives. At that point Mr. Louthian objected.

THE COURT: I will sustain the objection. I don't think we are concerned with that here. He is not charged with having any explosives in his possession.

Q. Mr. Mulcahey, this 4473 that you had Mr. Williford sign, did you want him to sign this form before you would sell him another firearm?

A. Yes.

Q. Okay, so it was condition to selling him the firearm that he sign that form?

A. If you mean by that that I told him, "You just sign this thing and fill it out any way you want to and then you can get a gun from me", no, that's not true.

Q. No, I didn't mean to imply that. I just merely meant—the question was simply, he was required to fill out the form truthfully ...

A. Yes.

[271] Q. ... before you would sell him the firearm?

A. That's correct.

Q. All right, now. And your testimony is that you wanted him to do that because you thought he had been dishonorably discharged?

A. Yes.

Q. All right, now, did it bother you at all that the person who was with him and who was supplying the money for these three transactions admitted to you that he had been convicted of a crime that would carry a penalty of more than one year?

A. The person that was with him did not supply the money. Mr. Williford paid for all three of those weapons himself. George Ferguson never took a penny out of his pocket.

Q. All right. Did it bother you at all that Mr. Ferguson told you that he had been convicted of a felony?

A. That's not a felony, that's a misdemeanor.

Q. How do you know?

A. Because he told me it was. He said it was a misdemeanor but it could carry a sentence of over a year. That's, I believe, what he said because I was surprised that shoplifting could carry a sentence of that nature.

Q. Well, All right, in answering Mr. Louthian's question your statement was that he, Mr. Ferguson, told you that [272] he had been convicted of a crime that carried a penalty of more than one year, is that correct?

A. That's right.

Q. That was Mr. Ferguson's words?

A. That's right.

Q. Did it strike you that he would use those words when on one of these forms it says, "Have you been convicted in any court of a crime punishable by imprisonment for a term exceeding one year?"

A. I don't understand the question.

Q. Well, instead of saying he had been convicted of a crime, isn't it unusual that he would throw in that extra language which, is it not, is peculiar to the firearms trade that you are concerned with people who have been convicted of a crime that carries more than a year?

A. Not if he had attempted to buy a firearm and been turned down for that reason.

Q. Do you think that's why he would have been familiar with the language?

A. It might very well be.

Q. It never occurred to you that perhaps these two gentlemen were working undercover for ATF?

A. No, not really.

Q. Are you sure that's not the reason why you asked Mr. Williford to sign that form, thinking that signing that [273] form would scare him off if he were working for ATF?

A. Mr. Williford did not impress me as an ATF agent at all. He really didn't.

Q. Not educated enough?

A. Well, not that so much as he just didn't impress me as being an ATF agent.

Q. All right, let's skip over to this January visit. You heard Mr. Williford testify that when he came in you acted very happy to see him. Now, my question to you is, were you happy because you thought that he had been mad that you made him sign this form and now he was back or were you happy because he had come back and you could sell another firearm?

A. I don't really remember being especially happy to see Mr. Williford. I mean Mr. Williford said that I was but I don't really remember being especially happy to see him.

Q. So if you weren't happy then you wouldn't have any reason for being happy?

A. Well, now, I don't know if I was happy or not. I mean, you know, there is all kinds of things that make peo-

ple happy and, but I don't remember seeing Mr. Williford being one of them.

Q. All right, now, your side of the conversation on January 13th about all of the firearms for sale, did I understand your testimony that it was Mr. Williford who first [274] asked if all that you had was for sale, referring to what he could see?

A. Yes, that's right.

Q. In other words, you were not the one who said, "All I have are for sale"?

A. Yes, that's correct. That's how he, when his hand, he did his hand like this and he said, "Are all these guns for sale?"

Q. And you replied, "Yes"?

A. And I said, "Yes, all those guns are for sale."

Q. Except the pump?

A. Well, the pump shotgun had been kind of mutually excluded from the conversation.

Q. Mr. Mulcahey, goverment's exhibit 4, that's the Smith and Wesson nine millimeter semi-automatic which Mr. Williford purchased from you in May of '76. Do you remember buying that from Mr. Mochel in March or April of 1976?

A. Yes, I believe I did.

Q. All right, now, Mr. Mochel is a federal licensed dealer, correct? At the time he was a federally licensed firearms dealer?

A. Yes, that's correct.

Q. And you used to be a dealer, right?

A. Yes, that's correct.

Q. And yet you purchased that firearm without filling [275] out one of these forms, isn't that right?

A. He told me that the gun was not his, that a friend of his had left if over there and that, and it wasn't his gun.

Q. Therefore it didn't have to go through his records?

A. I don't really know. I didn't—I don't really think so. I mean it wasn't, it wasn't his gun. It was a friend of his gun that had left it there.

Q. Mr. Mulcahey, between August 21, 1976, and December 3, 1976, some four months, you purchased six of these rifles, Lugar 223 caliber?

MR. LOUTHIAN: Objection, Your Honor. I think the record would show that there were four of them. Beg your pardon, there were three forms but there were six of those.

Q. All right, sir. Mr. Mulcahey, in a four months period you purchased six of these rifles, this Lugar M-14 223 caliber?

A. Yes, I did.

Q. All from Mr. Lain over in Lexington?

A. Yes, that's right.

Q. Now, this is goverment's exhibit 95 and we have two more here, government's exhibit 98 and government's exhibit 108. Now, did you purchase six of these in a four-month period and you only have three left on January 20th? [276] Can you tell me what happened to the other three?

A. These rifles—Mr. Lain has been a friend of mine for about ten years and these rifles were, he was able to buy these rifles at a good price so that he could sell them at a good price, but I, being a friend of his, he sells me things at a better price than he will sell other people things. So he called me and offered these rifles for sale for $158.08 and I told three of my friends about it and they asked me to buy, to buy each of them one. So that is, and so they gave me the money and I went over to Tom Lain's at various times and purchased them for them because I could get a better price than they could.

Q. I see. So you purchased three, one for each of three of your friends, and three you purchased for yourself?

A. I purchased, that rifle is already becoming a collector's item. On the side of it it's got something special written that will make it a collector's item. And what I had planned to do is to keep one myself and to put two up, and when my boys got older I would give them one each.

Q. Would you mind telling us the names of the three friends that you purchased these for?

A. I purchased one for Doctor Gale.

Q. G-a-l-e, is that the last name?

A. I believe so. And there was one for a Mr. Tollison.

Q. Tollison?

[277] A. Tollison. And I can't remember at this time who I purchased the third one for.

Q. All three of these friends?

A. Yes, sir.

Q. Live in Columbia?

A. No, sir.

Q. I'm sorry, where does Dr. Gale live?

A. Dr. Gale lives in Columbia.

Q. All right, Mr. Tollison?

A. Lives in Liberty.

Q. And do you know where the other fellow lives?

A. I can't remember who the other person was.

Q. But he is a good friend of yours, or just a friend?

A. The fact that I can't remember his name does not mean that he is not a friend of mine. I just do not, it just has slipped my mind temporarily.

MR. RUSCHKY: The Court's indulgence for a moment.

Q. Government's exhibit 45, this is a—well, you know more about guns than I do, Mr. Mulcahey. What is that?

A. It's a Marlin lever-action rifle.

Q. All right . . .

THE COURT: Speak up, sir.

A. Excuse me. I'm sorry. It's a Marlin lever-action rifle.

[278] Q. Do you remember where you got that?

A. No, I don't. I bought that, I bought a collection of guns all at one time and there were 14 or 15 of them, and this was one of them.

Q. Were these long guns?

A. Yes, sir, they were long guns with the exception, I believe, of one, of one handgun.

Q. All right, do you remember who you purchased this collection from?

A. No, I don't. I wrote down his name and I tried to find, I tried to find his, but I don't remember, but there was 14 or 15 of them, I believe.

Q. How about government's exhibit 65. I think this is one that Mr. Scroggie termed might possibly be a curio or relic.

A. That was part of the ones.

Q. Part of that collection?

A. Yes, sir.

Q. Well, let's jump right to the point, Mr. Mulcahey. I certainly do not mean to imply that you knew they were stolen, but are these, there were some 13 guns turned up here that turned up to be stolen. Were as far as you know these the guns that were purchased in this lump sum collection or would it help if I pointed them out to you individually?

[279] A. Some of them I know were, some of them—a single barrel shotgun just looks like a single barrel shotgun. I can't, there was, but these two were and several others of the ones that you pointed out I'm certain were.

Q. All right, how about the double barrel shotgun with the rabbit ears, government's exhibit 101? Was that part of the collection?

A. I'm not real sure.

Q. Okay. Now . . .

MR. RUSCHKY: The Court's indulgence for jut a moment, please.

That's all the questions I have, Your Honor.

MR. LOUTHIAN: I have nothing further.

JURY INSTRUCTIONS
(Criminal No. 77-00013)

[28] THE COURT: Now, Mr. Foreman, ladies and gentlemen, at this point in the trial you have heard the evidence presented by the parties, you have heard the final arguments of these attorneys. I want to caution you that the attorneys' arguments are not evidence of any kind. You are not to decide this case from the arguments of counsel. You are to make your factual determinations and to arrive at a fair and impartial verdict in this case from the testimony that you have heard presented to you from the witness stand and from the other evidence by means of exhibits that have been introduced during the trial of the case. I want you to bear in mind that these attorneys are advocates. They are partisans. They are trying to convince you that their side of the case should prevail. Now, you under

your oath as jurors, or I as the presiding judge of this trial, are not partisan in any sense of the word. Under our oaths of office under our solemn duties we must not be biased or prejudiced for or against any party. We must not be motivated by sympathy or public opinion or anything else in the case. This is a court of justice. We are here as part of this great system to dispense justice. That's the only justification for our being here today, to see that justice is done, justice to the defendant who sits there, as well as justice to the public interests whose interest is being [282] represented in this case by the prosecution.

Now, we must hold the scales of justice with even hands. The defendant and the public expect that you will carefully and impartially consider all of the evidence that has been presented to you during the trial of this case and arrive at a justice verdict, regardless of consequences. And I say regardless of consequences and I want you to know that during your deliberations you are not to be concerned in any sense of the word with what punishment the Court would hand out to the defendant should you find him guilty. That is a matter that is left entirely within my discretion and power as the presiding Judge of this trial and you in your deliberations should not be concerned with any potential type of punishment which may be given to this defendant should he be found guilty.

Now, we do, of course, permit these attorneys to give you their construction of what the evidence is and what the evidence shows and does not show, but again I say you must make your determination from the evidence presented from the witness stand. By like token, we even permit the lawyers to tell you what their conception of the law is that governs the factual issues in this case. There again, you are required to take the law from me as I give it to you. Now, if what I tell you is in keeping with what the lawyers say the law is, that's fine. Just bear in mind that it's my [284] responsibility to tell you what the correct principles of law are.

I want you to listen to my charge as a whole. Do not single out any one instruction to the exclusion of the others.

You as jurors must make your factual determinations and once you determine what the true facts are, then you will apply whatever legal principles that I give you to those facts and then you will arrive at a fair and impartial verdict.

I would want you to disabuse your minds of any conception of what you have that the law is or what the law should be. Please do not consider whether what I tell you the law is fair or proper because what I say to you is being taken down by the Court Reporter and if I should make an error in giving you a wrong or erroneous principle of law, then either party aggrieved thereby could appeal to our appellate court and that court, of course, would correct any errors that I would make in this case as it has done in other cases and it will probably do in the future.

Now, at the time you were selected as jurors in this case I told you that this indictment, and you will have it with you, Mr. Foreman and ladies and gentlemen, this white backed sheet of paper, that's been returned by a Grand Jury of this court against this defendant, is a more formal means by which to charge the defendant of the crime set forth [285] therein. This is the only offense for which the defendant is standing trial and you are not to consider any other type of offenses that may come to your mind based upon the evidence. We are concerned with this specific offense. That's the reason I want you to have this indictment with you when you go to the jury room. That's merely the contentions of the government. It is not any evidence at all against this defendant; neither does it give rise to any inference or presumption of his guilt.

Now, there are two types of evidence from which you the jury may properly find a defendant guilty of the offense with which he is charged. One is direct evidence. That is the testimony of an eye witness to an incident who tells you what he sees or hears or knows of his own knowledge. The other is circumstantial evidence which is the proof of a chain of circumstances pointing to the commission of an offense. Now, our law makes no distinction between the direct evidence and circumstantial evidence but merely requires that before convicting a defendant you the jury be

convinced of his guilt beyond a reasonable doubt from all of the evidence presented to you.

Now, our law presumes that this defendant is innocent of crime and although accused by means of this indictment he began this trial with a clean slate, with no evidence against him. Of course the law permits nothing but legal, [285] competent, relevant evidence to be presented before you the jury in support of the charges against him. That's the reason sometimes during the trial we had to excuse you from the courtroom while we discussed whether or not the Court would permit a certain type of evidence to be presented to you. So I say to you that this presumption alone, presumption of innocence, is sufficient to require that you acquit this defendant unless and until you the jury are convinced beyond a reasonable doubt that the defendant is guilty of the charges against him contained in this indictment.

Now, I would say to you ladies and gentlemen that a reasonable doubt is not a fanciful or a frivilous doubt. It is a doubt based upon reason and common sense. It's been said that it's a doubt for which you can assign a reason. It's also been said that it's a doubt which would cause a reasonably prudent person to hesitate in the handling of important affairs in his own life. Of course, you are expected to use your good judgment, your common sense, your knowledge of human beings and human nature. I would say this, that it is rarely possible to prove anything to an absolute certainty, but no defendant is to be convicted on mere suspicion or conjecture.

Now, reasonable doubt may exist in any case not only from the evidence produced but also from the lack of evidence. Now, since the burden of proof is upon the prosecution to [287] prove the defendant guilty beyond a reasonable doubt of every essential element of the offense charged, the defendant has the right to rely upon the failure of the prosecution to present such proof. In other words, the defendant is not called upon to prove his innocence; the prosecution must prove him guilty. Thus a defendant may rely upon evidence brought out on cross examination of the prosecution witnesses. Bear in mind that our

law does not impose upon a defendant the duty of calling any witnesses or producing any evidence. So I would say to you that a reasonable doubt exists in any case when after a careful and impartial consideration of all of the evidence you the jury are not convinced of the defendant's guilt beyond a reasonable doubt and to a reasonable moral certainty.

Of course, I have indicated to you that you are the sole judges of the facts and there is no appeal from your determination of what the true facts are. And as the sole judges of the facts that necessarily means that you are the sole judges of the credibility or the believability of the witnesses who have appeared before you. Each witness who has testified, even the one whose deposition testimony was published to you, was sworn before they testified and, of course, they are presumed to speak the truth, but this presumption of truthfulness may be outweighed by many matters and things. Again I say you are expected to use your good [288] judgment, your common sense and your knowledge of human nature in evaluating the testimony of the various witnesses. Consider if you will a witness' intelligence, his demeanor upon the witness stand, the manner in which he testified. Is his testimony ringing true with you? Does it convince you that he is telling the truth, or do you have serious doubts about his veracity or truthfulness? Consider also a witness' interest in a case, a witness' connection with either side of the case, how a witness may be affected by your verdict, whether a witness' testimony is either substantiated or contradicted by other evidence in the case. Of course, if it is shown that a witness makes contradictory statements while he is testifying or if he has made some other statement at some earlier time that's in conflict with what he says from the witness stand, all of those are matters which you should take into consideration in evaluating and giving credence or believability to a witness' testimony. Of course, you have it within your power to believe a portion of a witness' testimony or disbelieve another portion. You may believe one witness against several and you may believe the testimony of several against one. You surely may disbelieve a witness' testimony in its

entirety if you are convinced that witness is not worthy of belief. Of course, you would not do it arbitrarily but if you have good cause to disregard or disbelieve a witness [289] completely that's within your province. I would say that inconsistencies or discrepancies in the testimony of a witness or between the testimony of different witnesses may or may not cause you to discredit such testimony. We know that two or more people witnessing an incident or any transaction may see or hear it differently. An honest misrecollection like failure of recollection is not an uncommon occurrence. So in weighing the effect of a discrepancy, if there is such, consider whether it pertains to a matter of importance or an unimportant detail and consider whether such discrepancy results from innocent error or from willful falsehood.

Now, a defendant in a criminal case in this court has the absolute constitutional right to either testify or to refrain from testifying as he himself sees fit. Now, if a defendant does elect to take the stand and testify in his own defense as the defendant in this case has done, then he becomes as any other witness and you the jury must determine his credibility and his believability and give his testimony such weight as you think it deserves.

Now, ladies and gentlemen, coming directly to the charges against this defendant, this indictment provides that beginning on or about the 12th day of May, 1976, to the return date of this indictment which is January 19, 1977, that date is stamped right there, Mr. Foreman, during this period then, from May 12, 1976, to January 19, 1977, Patrick [290] M. Mulcahey unlawfully and knowingly did engage in the business of dealing in firearms without being licensed to do so as is required by the Gun Control Act of 1968 which is a federal gun control statute. And it's alleged that such acts on his part constituted a violation of sections 922(a)(1) and 924(a) of Title 18 of the United States Code.

Now, Section 922(a) reads as follows and I quote: "It shall be unlawful for any person except a licensed importer, licensed manufacturer or licensed dealer, to engage in the business of importing, manufacturing or dealing in firearms

or ammunition, or in the course of such business to ship, transport or receive any firearms or ammunition in interstate or foreign commerce". That means from one state to another or from a foreign country. Now, Section 924 (a) of Title 18 of the United States Code provides as follows and I'm quoting: "Whoever violates any provisions of this chapter, meaning the Gun Control Act of 1968, or knowingly makes any false statement or representation with respect to the information required by the provisions of this chapter to be kept in the records of a person licensed under this chapter or in applying for any license or exemption or relief from disability under the provisions of this chapter, shall be guilty of an offense against the laws of the United States."

Now, ladies and gentlemen, Section 921(a)(11) of [291] Title 18 of the United States Code defines dealer as follows, and I quote again: "The term 'dealer' means, (a) any person engaged in the business of selling firearms or ammunition at wholesale or retail, (b) any person engaged in the business of repairing firearms or making or fitting special barrels or stocks or trigger mechanisms to firearms, or (c) any person who is a pawn broker. The term 'licensed dealer' means any dealer who is licensed under the provisions of this chapter." In other words to be a dealer in firearms under this Gun Control Act a person must have a federal license to transact such business or deal in firearms.

Now, as used in these statutes a dealer means anyone who is engaged in any business of selling firearms and such business is that which occupies, attention and labor for the purpose of livelihood or profit. Attention and labor for the purpose of livelihood or profit, as I say. Thus, while the government need not prove that the defendant actually made a profit from his sales of firearms it must show a willingness on the defendant's part to deal, that he had a profit motive and it must also show a greater degree of activity on his part than an occasional sale made as a hobby as contrasted to a business activity. Thus, Section 922(a)(1) does not require that the government establish that a person engaged in the business of dealing in firearms actually makes a profit, even though the dealing activity [292] requires time, attention and effort. To be convicted of violating this

section it is not necessary that a defendant's primary business be dealing in firearms or that the dealing in firearms be on a profit-marking basis. But as I have just told you, before the prosecution would be entitled to a conviction in this case it must prove that the defendant was doing more than engaging in a hobby and that he only made an occasional sale.

Now, in order to prove the defendant guilty as charged the prosecution is not required to prove that the defendant knew his activity was unlawful or that he acted with intent to violate the Gun Control Act Sections which I have just read to you. Such considerations are irrelevant to your determination of the guilt or innocence of the defendant in this case. Since the Gun Control Act of 1968 is a regulatory statute adopted by Congress to control and limited the trafficking in firearms of all kinds, it is not incumbent or necessary for the prosecution to prove that the defendant acted with the specific intent to commit the acts alleged in the indictment. However, the prosecution must prove that the defendant knowingly and voluntarily did acts which were prohibited by the federal statutes or failed to do some acts required by the law to be done, and it is immaterial whether the defendant actually knew he was violating the law by his actions or his omissions.

[293] Now, the state of mind of a defendant or the knowledge with which he acted may be proved by circumstantial evidence and I would say to you that it is rarely possible to prove it by any other means. While witnesses may see and hear and thus be able to give direct evidence of what a defendant does or does not do, there can be no eye witness account of the state of mind with which such acts were done or omitted. But what a defendant does or fails to do may indicate knowledge or the state of mind with which his acts were done or omitted. It is reasonable to infer that a person ordinarily intends or knows the natural and probable consequences of acts knowingly done or knowingly omitted. In determining the issue of the defendant's knowledge or state of mind, you the jury are entitled to consider any statements made or acts done or omitted by him and all other facts and circumstances in evidence which may aid in

your determination of what was his state of mind or knowledge at the time such acts were done or omitted.

Now, the legal issue, the factual issue which you the jury are required to determine in this case is not so very complex. There are two elements of the offense with which the defendant is charged which the prosecution must prove beyond a reasonable doubt in order to gain a conviction against this defendant. First, the prosecution must prove that the defendant knowingly engaged in the business of dealing in [294] firearms as I have already defined that business to you, during or about the time alleged in the indictment, that is from May 13th, 1976 to January 19th, 1977. Secondly, the prosecution must prove that while carrying on such business the defendant did not have a valid federal license at that time as is required by the federal Gun Control Act of 1968 for one dealing in firearms.

Now, you will note that this indictment alleges that the defendant did certain acts unlawfully and knowingly. Now, unlawfully means contrary to law. Hence, to do an act unlawfully means to do knowingly and voluntarily something which is contrary to the law even though you don't know that it is against the law. To act knowingly means to act voluntarily and intentionally and not because of mistake or accident or inadvertence or any other innocent reason because we do not want any defendant to be convicted in this court because of some accident or mistake or any other innocent reason.

Now, the defendant contends that he was a victim of what we call illegal entrapment as to the crime charged in the indictment. Now where a person has no previous intent, purpose, predisposition or inclination to violate the law but is induced or over-persuaded by law enforcement officers or their agents to commit a crime, such defendant then is a victim of what we term "illegal entrapment", and [295] the law as a matter of policy forbids his conviction under such circumstances. On the other hand where a person already has the readiness, predisposition, willingness or inclination to break or violate the law, the mere fact that government agents provided what appears to be a favorable opportunity to violate a law is not entrapment. For exam-

ple, when the government expects that a person may be engaged in some illegal activity such as selling bootleg whiskey or dealing in firearms without the proper license, it is not entrapment for a government agent to pretend to be someone else and to offer either directly or through an informer, decoy or an undercover agent, to give such a person an opportunity to attempt to purchase a gun from such suspected person. Thus, if you the jury should find beyond a reasonable doubt from the evidence presented to you in this case that before anything at all occurred respecting the alleged offense involved, the defendant was ready, willing and able to deal in firearms without a license whenever such opportunity was presented or afforded to him, and that government officers or their agents did no more than offer that opportunity, then you should find that the defendant is not a victim of such illegal entrapment which would require that he be acquitted. On the other hand, if the evidence in this case should leave you with a reasonable doubt whether the defendant had the previous intent, purpose, predisposition or [296] inclination for committing the offense of the character charged against him and that he did so only because he was induced or persuaded unduly by some officer or agent of the government, then it is your duty to acquit him.

You have heard the evidence, ladies and gentlemen, and it's for you to say what is the situation in reference to this contention of the defendant.

As I conclude I would say to you ladies and gentlemen that there is nothing peculiarly different from the way that you consider the proof in this criminal case from that in which all reasonable persons treat any question depending upon evidence presented to them. You are expected to use your good judgment, your common sense, consider the evidence for only those purposes for which it was presented and give it a reasonable and fair construction in the light of your common knowledge of the natural tendencies and inclinations of human begins. If the defendant be proved guilty, say so; if not proved guilty, say so. Keep constantly in mind that it would be a violation of your sworn duty to base a verdict upon anything but the evidence in this case. I would

also ask you to remember that the question before you can never be, will the government win or lose this case, because our government always wins when justice is done regardless of whether your verdict is guilty or not guilty.

Now, I have asked the Clerk, Mr. Foreman, to prepare [297] the form of verdict and I have it here on this blue-backed sheet of paper. We have the caption of the case and criminal docket number and the word Verdict. Then we have, "We the jury unanimously find the defendant, Patrick M. Mulcahey," and then a long line. Based upon your view of the evidence you will insert there either "guilty" or "not guilty" depending, of course, upon your view of the evidence. Then you would sign your name, sir, above the line under which your name is typed in as Foreman. And by your signature you would be certifying to the court that all 12 of you jurors have agreed to whatever verdict you have returned. Then you would merely insert the date where it says March blank, 1977; and in that connection your verdict whatever it must be must represent the considered judgment of all 12 of you. All 12 of you must agree to it. In other words, your verdict must be unanimous.

In conclusion I would say that it is your duty as jurors to confer with each other and to discuss the evidence and to deliberate with a view of arriving at a verdict in this case if you can do so. You surely are expected to swap your views, to discuss your opinions and to share your sentiments with your fellow jurors. That's the reason we have 12 people serving on our juries in a criminal case. We want the considered judgment of all of you after a careful consideration of all of the evidence. Now, during your [298] deliberations do not hesitate to change your opinion if you are convinced that your first view was wrong or erroneous. But I would not ask you to give up a deep-seated or firm conviction as to the evidence merely because of the opinion of your fellow jurors or for the mere purpose of arriving at a verdict, realizing that when your verdict was arrived at and received by the Court you would be free to go your way. I want you to understand and remember that you are not partisans, you are judges, you are judges of the facts, and

as I told you in the very beginning of any charge your sole purpose for participating in this trial is to see that justice is done, justice to the defendant and justice to the public whose interest is represented by the prosecution.

Now, I'm going to let you be excused from the courtroom. I have got to give counsel the opportunity to take any exceptions to my charge for the record they may want to. I also will give them an opportunity to make any additional requests for charge that I may have inadvertently omitted. It may be necessary for me to bring you back; otherwise the Marshal will take you to your jury room and you will commence your deliberations. Once you have arrived at a unanimous verdict and you, Mr. Foreman, have filled out the verdict form as I have instructed you, dated it, signed your name, then we will bring you back into the courtroom to receive your verdict. Now, the Marshal will bring along the indictment, form of verdict, and all of these exhibits. That is going to be something of a job, but if you want all of these guns down in the jury room with you you are entitled to have them. Now, I see, Mr. Foreman, that you are kind of shaking your head. Do you prefer that the exhibits not be brought?

THE FOREMAN: I don't believe so.

THE COURT: You are surely entitled to them. I won't send them down initially since all of you seem to be of one accord that you don't think it is necessary, but they are here for your benefit and don't hesitate at all during the deliberations to tell the Marshal who will be stationed outside your door to bring them to you if you or any one of you has any feeling that you want any or all of them there because they are here available to you.

Now, insofar as these other exhibits, these documents and what-have-you, that have been introduced in evidence, that poses no problem so I will send those along but all of these exhibits have been introduced into evidence for your benefit and they are available to you and I want you to have them if any one of you should want them. So at this time I will ask you to step outside for a few moments.

* * * *

[302] THE COURT: Mr. Foreman, ladies and gentlemen, I meant to comment to you at the end of my charge that if

during your deliberations you had any legal questions or a matter that was worring you, I wanted you to feel free to ask it. I usually do that but I neglected to do so in your case. But I'm glad that you did take the liberty of contacting me because that's what I want you to do any time you have any legal question because it's my responsibility as presiding judge of this trial to try to answer any questions that you have pertaining to any legal matter in question.

I'm not in a position or I don't as a practice make any comment or express any opinion about the facts in the case, about the evidence. We are permitted in our federal courts to comment upon the facts or the credibility of the witnesses or what-have-you if we see fit so long as we feel [303] that it is ultimately your responsibility to find the facts and judge the credibility. But I have confidence in my juries to the extent that I never try to hold my opinion about the facts or merits of the case on the jury because I want the juries to decide those without any indication from me as to how I may personally feel about the case, and I surely want you to understand that nothing that I say during the trial or during my charge should be taken by you as any intimation of how I might personally feel about the case. I surely think it is completely immaterial from your standpoint as to how the presiding judge may feel. This is a little off of what I brought you back for. I have this message from you, Mr. Foreman, in which you say that you want the law of entrapment. I assume that you want me to repeat what I told you earlier about the law of entrapment. Of course, as a preliminary to that I would say that of course we have what we call an illegal entrapment. That is where some person who has no inclination or has no predisposition or motive or intent or purpose to violate the law at all, has some law enforcement officer or some undercover agent or what-have-you to come to him and put such persuasion upon him that he gets an innocent individual who has no desire or motive or intent to violate the law to actually violate the law. That that is what I said is illegal entrapment. Now the defendant in this case asserts that he was such a victim of such illegal [304] entrapment as to the

crime that he is charged with in this indictment, that is the carrying on of the business of a firearms dealer. Now where a person has no previous intent, motive, design, inclination or predisposition to violate the law but is induced or talked into it or persuaded to do it by law enforcement officers or their agents, which he would not be inclined to do without this over-persuasion or this inducement by the law enforcement officers, then he is a victim of entrapment under those circumstances. And our law as a matter of public policy forbids the conviction of a defendant who has had that forced upon him or induced upon him to convict, I mean to commit the crime. He cannot be convicted under those circumstances. Ordinarily where a person already has the readiness, willingness, motive or design or the intent or the predisposition or whatever you want to call it to commit the offense with which he is charged, the mere fact that the government agents, whether they be undercover agents or what-have-you, where these government agents provided what appears to be a favorable opportunity to violate the law, this does not constitute entrapment. For example, as I told you earlier, where the government has cause to suspect that a person may be engaged in violation of some of our laws such as making and selling moonshine whiskey in violation of a federal as well as a state law or of selling firearms without a federal license as the [305] defendant is charged in this case, it is not entrapment for a government agent or one working with the government agency to pretend to be someone else and to offer either directly or through an informer or a decoy or undercover agent to give such a person an opportunity to purchase a gun or whiskey from such suspect person. In other words, as long as all the government agents are doing is offering such person an opportunity to break the law and he is not overly induced or overly persuaded to do it, then that is not entrapment. However, if you the jury should find beyond a reasonable doubt from the evidence in the case that before anything at all occurred with respect to the alleged offense with which the defendant is charged, that the defendant himself was ready, willing and able to deal in firearms without a license whenever such opportunity was presented and that the

government agents or officers did no more than offer the defendant the opportunity to sell the guns, then you should find that the defendant is not a victim of such illegal entrapment which would require that he be acquitted. Now, on the other hand, if the evidence in the case should leave you, the jury, with a reasonable doubt whether the defendant had such previous intent, purpose, design or motive or inclination or predisposition to commit such an offense as charged in the indictment and that the defendant did so only because he was induced or persuaded by the government officer or [306] agents, then you should acquit him. Now it is just that simple, whether or not the defendant was ready, willing and able to do it and all the government agency did was afford him the opportunity and he did it, or whether he was a law-abiding citizen sitting out there and the government agents came in and induced him or persuaded him, when he had no inclination, no predisposition, intent, to violate the law, then in that latter circumstance he can't be convicted but under the former circumstances he can be. Does that answer your question now?

THE FOREMAN: Yes, sir.

THE COURT: Do you have any other questions of legal matters that may be worrying any of you?

In the Supreme Court of the United States

No. 82-1041

UNITED STATES, PETITIONER

v.

ONE ASSORTMENT OF 89 FIREARMS

ORDER ALLOWING CERTIORARI. FILED February 22, 1983

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit is granted.

Office-Supreme Court, U.S.
FILED
FEB 2 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1047

In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA, PETITIONER

v.

ONE ASSORTMENT OF 89 FIREARMS, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court below properly held that a statutory forfeiture proceeding, filed by the United States and based on a claimed violation of the federal criminal statute pertaining to unlicensed dealing in firearms, is barred by an earlier acquittal establishing that there was in fact no such violation.

2. Whether the court below properly held that the forfeiture action, based upon the identical acts as the criminal case, is also barred by the doctrine of collateral estoppel and by the double jeopardy clause of the fifth amendment to the United States Constitution.

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No. 82-1047

In the Supreme Court of the United States

OCTOBER TERM, 1982

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ONE ASSORTMENT OF 89 FIREARMS,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The panel opinion of the court of appeals (Pet. App. B. 15a-29a) is reported at 669 F.2d 206. The *en banc* opinion of the court of appeals (Pet. App. A. 1a-14a) is reported at 685 F.2d 913. The district court opinions (Pet. App. E. 45a-55a; Pet. App. D. 31a-44a) are reported at 463 F. Supp. 365 and 511 F. Supp. 133.

JURISDICTION

The judgment of the court of appeals (Pet. App. C. 30a) was entered on August 23, 1982. On November 12, 1982 the Chief Justice extended the time in which to file a petition for writ of certiorari to and including December 21, 1982 and the petition was filed on December 20, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. 1. The fifth amendment to the United States Constitution, including the double jeopardy clause, provides:

> No person shall be held to answer for a capital, or other infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life and limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. The seventh amendment to the United States Constitution provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rule of the common law.

B. "Chapter 44 - Firearms" of title 18, United States Code, provides in pertinent part:

1. 18 U.S.C. §922. Unlawful acts. (a) It shall be unlawful -
   (1) For any person, except a licensed importer, licensed manufacturer, or licensed dealer, to engage in the business of importing, manufacturing or dealing in firearms or ammunition, or in the course of such business to ship, transport or receive any firearm or ammunition in interstate or foreign commerce;

2. 18 U.S.C. §924. Penalties.
   (a) Whoever violates any provision of this chapter or knowingly makes any false statement or representation with respect to the information required by the provisions of this chapter to be kept in the records of a person licensed under this chapter, or in applying for any license or exemption or relief from disability under the provisions of this chapter, shall be fined not more than $5,000, or imprisoned not more than five years, or both, and shall become eligible for parole as the Board of Parole shall determine.

   (b) Whoever, with intent to commit therewith an offense punishable by imprisonment for a term exceeding one year, or with knowledge or reasonable cause to believe that an offense punishable by imprisonment for a term exceeding one year is to be committed therewith, ships, transports, or receives a firearm or any ammunition in interstate or foreign commerce shall be fined not more than $10,000, or imprisoned not more than ten years, or both.

   (c) Whoever -
      (1) uses a firearm to commit any felony for which he may be prosecuted in a court of the United States, or

      (2) carries a firearm unlawfully during the commission of any felony for which he may be prosecuted in a court of the United States,

shall, in addition to the punishment provided for the commission of such felony, be sentenced to a term of imprisonment for not less than one year nor more than ten years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to a term of imprisonment for not less than two nor more than twenty-five years and, notwithstanding any other provision of law, the court shall not suspend the sentence in the case of a second or subsequent conviction of such person or give him a probationary sentence, nor shall the term of imprisonment imposed under this subsection run concurrently with any term of imprisonment imposed for the commission of such felony.

(d) Any firearm or ammunition involved in or intended to be used in, any violation of the provisions of this chapter or any rule or regulation promulgated thereunder, or any violation of any other criminal law of the United States, shall be subject to seizure and forfeiture and all provisions of the Internal Revenue Code of 1954 relating to the seizure, forfeiture, and disposition of firearms, as defined in section 5845(a) of that Code, shall, so far as applicable, extend to seizures and forfeitures under the provisions of this chapter.

(Added Pub.L. 90-351, Title IV, §902, June 19, 1986, 82 Stat. 233, and amended Pub. L. 90-618, Title I, §102, Oct 22, 1968, 82 Stat. 1223; Pub. L. 91-664, Title II, §13, Jan. 2, 1971, 84 Stat. 1889.)

STATEMENT

1. *The Earlier Criminal Proceeding.*

Patrick M. Mulcahey was indicted by the Grand Jury in the

United States District Court of South Carolina, Columbia Division, for an alleged violation of the provisions of chapter 44, 18 U.S.C. §§922(a)(1) and 924(a). *United States v. Mulcahey*, No. 77-00013 (D. S. Car.). The one count indictment alleged that Mulchey was engaged in the business of dealing in firearms without being licensed to do so under the provisions of "Chapter 44 - Firearms" of Title 18, United States Code. On March 16, 1977 after a full trial the jury found Mulcahey not guilty of the alleged violation. The district court accordingly entered a judgment of acquittal and dismissed the indictment.

2. *The Present Forfeiture Proceeding.*

On March 31, 1977, or approximately 2 weeks after the jury had found that Mulcahey had not violated the firearms laws, the United States commenced this second action in the United States District Court for the District of South Carolina, this time seeking forfeiture to the United States of the same firearms on which the Government's unsuccessful criminal prosecution against Mulcahey had been based. The Government complaint in the forfeiture action alleged that Mulcahey, while engaged in dealing in firearms without a license violated 18 U.S.C. §922(a)(1) of Chapter 44. The Government claimed that: "such firearms were had and possessed and used and intended to be used -- by Patrick M. Mulcahey in Richland County, South Carolina, in violation of the laws of the United States by engaging in the business of a dealer in firearms and ammunition without the said Patrick M. Mulcahey having first applied for and received a license as a dealer in firearms --." Forfeiture of the firearms was sought under 18 U.S.C. §924(d), one of the "Penalties" provisions of chapter 44, 18 U.S.C. §924.

Mulcahey filed a claim for recovery of the firearms which had, in the meanwhile, been seized from him by the Government. Mulcahey also answered the forfeiture complaint, asserting several defenses, including the doctrines of collateral

estoppel and res judicata as a bar to the claimed forfeiture.[1]

The district court, reexamining the jury's finding of "no violation," rejected that finding and substituted its own finding to the effect that Mulcahey dealt in firearms without a license and had thus violated 18 U.S.C. §922(a)(1). The district court then rejected Mulcahey's collateral estoppel and res judicata defenses and ruled that the firearms were subject to forfeiture under 18 U.S.C. §924(d).

The Court of Appeals for the Fourth Circuit reversed, holding that the forfeiture action was barred by Mulcahey's criminal acquittal. The court noted that "the same firearms that were introduced into evidence in the criminal action are the subject of the forfeiture action." Pet. App. B. 21a. The court further noted that "(t)o support a conviction under 18 U.S.C. §922(a)", as well as in a forfeiture action, the "Government must prove" the "same two essential elements": first, that the defendent engaged in the business of dealing in firearms and, second, that at that time he engaged in that business he was not a licensed dealer in firearms. Pet. App. B. 20a-21a. Noting that the "United States had its day in court on these identical issues

[1] Our brief in opposition relies only on those defenses which were reached and considered by the court below. By so limiting our brief in opposition, we do not intend thereby to abandon or waive any other defenses or any of our other challenges to the district court judgment not required to be considered by the court below in view of its disposition of the case. In brief, those additional defenses and challenges were *inter alia*:

(1) The Court erred in finding that Mulcahey engaged in the business of dealing in firearms, and

(2) The Court erred in finding that the firearms seized were the same as those alleged to have been used in the firearms business.

If certiorari should be granted by this Court, or in the event of any other further proceedings, we intend to rely on and reassert those additional defenses and challenges.

in the criminal proceeding" the court of appeals ruled that under the doctrine of collateral estoppel the Government is precluded by the verdict of acquittal in the criminal proceeding from relitigating the identical matter in the forfeiture action. (Pet. App. B. 21a).

As an indepdent ground for reversing the district court, the court of appeals also emphasized that 18 U.S.C. §924(d) subjects firearms to forfeiture, only upon a showing of "violation of any of the provisions of this chapter (i.e., Chapter 44 - Firearms of Title 18, United States Code) . . . or any violation of any other criminal law of the United States." 18 U.S.C. §924(d). The United States had failed to meet this statutory requirement, the court of appeals ruled, because "the criminal verdict conclusively decided that the firearms in question were not 'involved in or used or intended to be used in the violations of any provisions of this Chapter (i.e., Chapter 44 - Firearms)'." Pet. App. B. 21a and 8a. Judge Winter dissented.

On rehearing, the court of appeals *en banc*, by a 5-4 vote, again reversed the district court's order of forfeiture. Pet. App. A. 1a-14a. The *en banc* court flatly rejected the Government's argument that a prior acquittal does not bar subsequent forfeiture proceedings. In addition to the grounds relied on by the panel opinion, the *en banc* court pointed out that "the present forfeiture is criminal in nature and the prior jury verdict is a bar to the present proceeding." Pet. App. A. 9a. In that connection, the court took special note of the fact that:

> "the forfeiture provision set forth in §924(d) is a part of the 'Penalties' section of the law. Everything in §924 provides a penalty, be it fine, prison or forfeiture, for the violation of a provision of the Gun Control Act. The forfeiture provision is merely a way of disposing of firearms which have been used in violation of the Act *after there is a conviction of such violation.* Forfeiture is

a penalty suffered by a defendant in addition to a fine and/or imprisonment. If Mulcahey had been convicted, he could have been fined and/or imprisoned and would have lost all of his firearms under §924(d). But he was acquitted on the charge of being a gun dealer without a license. However, the Government still wishes to invoke the penalty of §924(d). Mulcahey would thereby be subject to the same penalty of losing his property for an activity for which he had been found not guilty." Pet. App. A. 9a-10a. (Emphasis supplied.)

REASONS FOR DENYING THE WRIT

Certiorari should be denied because:

A. This case presents no issue of far-reaching, recurrent importance. To the contrary, the decision below is the natural result of the particularized facts of this case involving a unique situation unlikely to recur.

B. The holding below is manifestly correct as to each of the three independent grounds on which it is based. Moreover, the correctness of that holding finds further strong support in the dual purposes underlying the doctrines of collateral estoppel and *res judicata*, i.e., to protect litigants from the harassment and burdens of relitigating the same cause of action with the same parties or thier privies and to promote judicial economy by preventing needless re-litigation. *Parklane Hosiery, Inc. v. Shore*, 439 U.S. 322, 326 (1979); *Montana v. United States*, 440 U.S. 147, 153-54 (1979). These purposes, we note, are not considered or even addressed by the United States, despite the primary role normally claimed by the Government as champion of fair, efficient and prompt administration of justice in the federal court system.

C. Finally, as the opinion of the court below abundantly demonstrates, there is no conflict with any decision of this Court or any other court of appeals.

Further review by this Court, therefore, is not warranted.

A. *Lack of "certiorari" importance.* The issue raised by the Government is plainly not of sufficient importance to warrant review here. The present case does not involve the recurring or "fairly novel legal" question as to whether a criminal *conviction* may be given collateral estoppel effect in subsequent *private* civil suits arising out of the same events that had triggered the conviction. *Travelers Indemnity Co. v. Walburn,* 378 F. Supp. 860, 862 (D., D. of Col.) (1974);[2] *Eagle Star & British Dominions Insurance Co. v. Heller,* 149 Va. 82, 140 S.E. 314 (1927); *Hurtt v. Stirone,* 416 Pa. 493, 498, 206 A.2d 624, 626, *cert. denied,* 381 U.S. 925 (1965) (where the Pennsylvania Supreme Court emphasized that the failure to give collateral estoppel effect to a prior jury determination of guilt would "fly in the face of reason (and be a) general indictment of the whole American jury system."

The present case, as already noted, does not involve this kind of recurring question. To the contrary, the present case turns on an entirely unique and specialized set of facts in which

(1) the criminal prosecution filed by the United States against Mulcahey resulted in an acquittal, not a conviction;

(2) despite the acquittal, the United States, rather than a

[2] In *Travelers,* the court reasoned that when a person has received a full and fair opportunity to litigate, "it is only sensible that if an issue is necessarily decided in the criminal case it should be accepted as conclusive proof in a subsequent civil proceeding where that issue is dispositive." 378 F. Supp. 862, 868.

private litigant who had not participated in the criminal proceeding, has filed the second proceeding (for forfeiture) seeking to relitigate the identical issues on which its own abortive criminal prosecution had been based;

(3) the initial criminal prosecution obviously afforded the United States a full and fair opportunity to litigate the basic issue dispositive of both the criminal prosecution and the later forfeiture proceeding, i.e., did Mulcahey violate the federal criminal law as to dealing in firearms;

(4) the jury verdict in the criminal proceeding conclusively determined that Mulcahey had committed no such violation; and

(5) the forfeiture statute itself denies the United States forfeiture in the absence of a showing of such a violation.

We show below that these special facts and circumstances confirm the correctness of the decision below. At the same time, the highly unique character of these special facts buttresses the view that the issue raised by petitioner United States is unlikely to recur and hence lacks sufficient importance to be an appropriate candidate for a grant of certiorari.

B. *The decision challenged here is plainly correct.*

1. The decision below, in barring the forfeiture action, properly relies on the Government's failure to meet the essential precondition for invoking the forfeiture statute. 18 U.S.C. §924(d) prescribes a built-in and express requirement for seeking forfeiture, that is, the Government must establish that the firearms involved were used in "violation of the provisions of (Chapter 44 - Firearms, Title 18, United States Code) . . . or a violation of any other criminal law of the United States." The Government obviously failed here to make any such showing of the necessary "violation." To the contrary, the

jury acquittal constitutes a direct holding that there was no violation of the criminal laws. In sum, the Government improperly sought forfeiture because it is only when the forfeiture is claimed to arise out of the commission of a criminal offense that §924(d) is triggered into operation. See *1 Lot Emerald Cut Stones v. United States*, 409 U.S. 232, 236 at n.6 (1972). Here, however, the jury's acquittal of Mulcahey unequivocally established that there was no violation of the federal criminal law.[3] As emphasized in both the panel and *en banc* opinions (Pet. App. A. 8a and Pet. App. B. 21a), "the criminal verdict conclusively determined that the firearms were not involved in or used or intended to be used in the violation" of federal criminal law. In short, the verdict of acquittal necessarily refutes the notion that the forfeiture action is based on a violation of federal criminal law.

2. The correctness of the decision below is independently corroborated by the doctrine of collateral estoppel. This Court has frequently reiterated the need for applying this doctrine in order to minimize the harassment and heavy burdens imposed by relitigation on both defendents as well as on the court system. *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 and *Parklane Hosiery Company, Inc. v. Shore*, 439 U.S. 322.[4] Furthermore, in *Allen*

[3] The seventh amendment (*supra*, p. 2) immunizes this jury finding against "re-examination in any court of the United States."

[4] *Blonder-Tongue* involved the defensive use of the estoppel plea. The *Parklane Hosiery* case presented the question as to whether a second or a different plaintiff could use estoppel offensively, i.e., as a sword rather than a shield. The precise issue before this Court in *Parklane* was whether a party who has had issues of fact adjudicated adversely to it in an equitable

(Footnote continued on following page.)

(Continuation of previous footnote.)

action may be collaterally estopped from relitigating the same issues before a jury in a subsequent action for money damages brought against it by a new party. In the *Parklane* case, the first action involved a suit by the SEC against Parklane Hosiery, alleging that Parklane Hosiery had issued a materially false and misleading proxy statement in connection with a merger. The SEC complaint sought injunctive relief. The district court in that suit agreed with the SEC and ruled that the proxy statement of Parklane had been materially false and misleading. The Court of Appeals for the 2nd Circuit affirmed that judgment. In the second Parklane case, i.e., the one reaching this Court, the plaintiffs were stockholders who claimed money damages as a result of Parklane's allegedly false and misleading proxy statement. This Court, in *Parklane*, in allowing the new plaintiffs to take advantage of the earlier ruling obtained by the SEC in its injunctive suit, authorized the offensive use of collateral estoppel.

In both cases, this Court's principal concern was whether the party, against whom estoppel was being sought, had had a full and fair opportunity to litigate the issue in the earlier case. As cogently noted in this Court's opinion in *Blonder-Tongue*, "the broader question is whether it is any longer tenable to afford a litigant more than one full and fair opportunity for judicial resolution of the same issue." 402 U.S. 313. Indeed, over thirty years ago, Judge Hastie, foreshadowing this sensible development in the law, declared that "a party who has had one fair and full opportunity" to litigate and "has failed in that effort", should not be permitted to go to trial on the merits of that claim for a second time. Both orderliness and reasonable time-saving in judicial administration require that this be so unless some overriding consideration of fairness to a litigant dictates a different result". *Bruszewski v. United States*, 181 F.2d 419, 421 (CA-3 1950) *cert. denied*, 340 U.S. 865. *Accord: Adriaanse v. United States*, 184 F.2d 968 (CA-2 1950) *cert. denied*, 340 U.S. 932.

In the present case, there can be no doubt that there was a full and fair, indeed abundant, opportunity afforded to the United States, in its criminal case, to litigate the question of violation of the federal criminal laws with respect to firearms. As expressly noted in the panel opinion below, "the United States had its day in court on these identical issues in the criminal proceeding." (Pet. App. B. 21a).

v. McCurry, 449, U.S. 90, 105 (1980), this Court approved giving collateral estoppel effect, in a federal court, to an earlier state court criminal determination. *A fortiori*, the same approval is called for here as to the ruling below according collateral estoppel effect, in the forfeiture proceeding in the federal court, to the earlier determination in the criminal proceeding in the same *federal* court.

The foregoing considerations are completely overlooked by the Government, despite the fact that this Court has long recognized that "public policy dictates that there be an end to litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties." *Baldwin v. Travelling Mens Association*, 283 U.S. 522, 525 (1931). The doctrine of collateral estoppel and the associated "doctrine of *res judicata* (are) not a mere matter of practice and procedure inherited from a more technical time than ours. It is a rule of fundamental and substantial justice, of public policy and of private peace, which should be cordially regarded and enforced by the Court." *Hart Steel Co. v. Railroad Supply Co.*, 244 U.S. 294, 299 (1917). As emphasized less than two years ago in *Federated Department Stores, Inc. v. Moitie & Brown*, 452 U.S. 394, 401 (1981),

> "The language used by this Court half a century ago is even more compelling in view of today's crowded dockets."

3. There is still a third ground, separately establishing the correctness of the result reached below. Almost 100 years ago this Court held that "proceedings instituted for the purpose of declaring a forfeiture of a man's property by reason of offenses committed by him, though they may be civil in form, are in their nature criminal." *Boyd v. United States*, 116 U.S. 616 (1886). It follows that once a person is tried criminally for a

violation of a statute, that same violation cannot, because of the double jeopardy clause of the Fifth Amendment, form the basis for a subsequent forfeiture action, whether the criminal proceeding results in conviction or, as here, in acquittal. As the *en banc* opinion properly ruled "The present forfeiture is criminal in nature and the prior jury verdict is a bar to the present proceeding." (Pet. App. A. 9a).

C. *There is no conflict of decisions.*

The conflicts in decisions, asserted by the Government, are illusory. The cases principally relied on by the Government have already been carefully analyzed and properly distinquished in the opinion below. See Pet. App. A. 6a, 8a, 9a, 10a and 11a. There is no conflict calling for resolution by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Brief for the Respondent in Opposition was served upon counsel for the petitioner, The Honorable Rex E. Lee, Solicitor General of the United States, United States Department of Justice, Washington, D.C. 20530 and on Mary G. Slocum, Assistant United States Attorney, Post Office Box 2266, Columbia, South Carolina 29202, by first class mail with proper postage affixed this 31st day of January, 1983.

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No. 82-1047

In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA, PETITIONER

v.

ONE ASSORTMENT OF 89 FIREARMS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

REX E. LEE
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There is no substance to any of the grounds advanced by respondent in opposition to the petition.

1. In reliance on two civil cases, *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322 (1979), and *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U.S. 313 (1971), respondent contends (Br. Opp. 11-13) that his prior acquittal on criminal charges bars the government from pursuing a subsequent civil in rem forfeiture proceeding. The argument, however, ignores the fact that this Court has held that the difference between the burdens of proof in criminal and civil actions prevents application of the doctrines of collateral estoppel or res judicata to civil suits brought after a criminal acquittal. *One Lot Emerald Cut Stones & One Ring* v. *United States*, 409 U.S. 232, 235 (1972); *Helvering* v. *Mitchell*, 303 U.S. 391, 397 (1938). See also Pet. 10-13. Respondent's related assertion that the government has already " 'had its day in court' " (Br. Opp.

12 n.4, quoting Pet. App. 21a) is equally unpersuasive because it ignores the factors that militate against giving a criminal acquittal preclusive effect in subsequent litigation. In *Standefer* v. *United States*, 447 U.S. 10, 22 (1980), this Court concluded that a criminal acquittal does not collaterally estop the government because "in a criminal case the Government is often without the kind of 'full and fair opportunity to litigate' that is a prerequisite of estoppel." The Court noted that the government cannot secure a new trial regardless of the fact that "an acquittal was plainly contrary to the weight of the evidence," nor can the government "secure appellate review where a defendant has been acquitted" (447 U.S. at 22). These factors permit juries to acquit "out of compassion or compromise or because of ' "their assumption of a power which they had no right to exercise, but to which they were disposed through lenity" ' " (*ibid.*; citations omitted). As the dissenting judges below noted (Pet. App. 13a), the jury may have acquitted petitioner on the criminal charges because it concluded that he was entrapped into committing an illegal sale even though it may have found that he was engaged in the business of dealing in firearms without a license. Thus, respondent's prior acquittal does not preclude the present forfeiture action.

In reliance on *Boyd* v. *United States*, 116 U.S. 616 (1886), respondent argues that "once a person is tried criminally for a violation of a statute, that same violation cannot, because of the double jeopardy clause * * *, form the basis for a subsequent forfeiture action" (Br. Opp. 13-14). In *United States* v. *Ward*, 448 U.S. 242, 253 (1980), however, the Court rejected a similar contention, noting that it "has declined * * * to give full scope to the reasoning and dicta in *Boyd*." Significantly, neither respondent nor the court below advert to the two-level inquiry mandated by *Ward*, which, as demonstrated in our petition (Pet. 13-18), establishes that the present forfeiture proceeding is a civil

penalty. Because the present forfeiture proceeding is civil rather than criminal in nature, respondent's invocation of the Double Jeopardy Clause of the Fifth Amendment is unavailing.

In a final attempt to raise the shield of collateral estoppel, respondent asserts (Br. Opp. 10-11) that the "jury acquittal constitutes a direct holding that there was no violation of the criminal laws," thus precluding a forfeiture action based upon the violation of federal gun control law. 18 U.S.C. 924(d). This contention can be quickly put to rest. An acquittal, of course, establishes only that the government has not shown beyond a reasonable doubt that certain facts exist; it does not conclusively or even probably establish that those facts do not exist. Thus, petitioner's prior acquittal could bar a civil forfeiture action under 18 U.S.C. 924(d) only if it prevented the government from showing that, notwithstanding the acquittal, a violation of the gun control laws actually occurred. As shown above, a criminal acquittal raises no such estoppel. *Standefer* v. *United States, supra*, 447 U.S. at 22; *One Lot Emerald Cut Stones* v. *United States, supra*, 409 U.S. at 235.

2. Respondent claims (Br. Opp. 14) that the "conflicts in decisions asserted by the Government are illusory." In so asserting, respondent completely ignores the fact that the lower court's ruling does not comport with this Court's decision in *United States* v. *Ward, supra*, nor with the teachings of *Helvering* v. *Mitchell, supra*, and *One Lot Emerald Cut Stones* v. *United States, supra*. Pet. 13-17. Respondent cannot render a conflict "illusory" by the simple expedient of disregarding the prior decisions of this Court. Similarly, rather than discussing the conflicting circuit court opinions noted in our petition (Pet. 17), respondent simply rests (Br. Opp. 14) on the opinion of the court below--even though that opinion discusses only two of the

conflicting cases cited in our petition. See Pet. App. 8a-9a. Respondent has failed to show, let alone "abundantly demonstrate[ ]" (Br. Opp. 9), that "there is no conflict with any decision of this Court or any other court of appeals" (*ibid.*).

3. Respondent contends (Br. Opp. 8) that the decision of the en banc court below does not raise any issue of importance. As we pointed out in our petition (Pet. 18 n.8), however, the decision will create grave confusion as to whether civil or criminal procedures should be followed in forfeiture actions under 18 U.S.C. 924(d). The possible implications of the decision, therefore, are not insubstantial. See Pet. 18-19 n.8 (the decision below might "require application of the Federal Rules of Criminal Procedure to all forfeiture proceedings based on a violation of federal criminal law").

Accordingly, it is respectfully submitted that the petition for a writ of certiorari should be granted and the judgment of the court of appeals reversed.

REX E. LEE
Solicitor General

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QUESTION PRESENTED

Whether a gun owner's prior acquittal on criminal charges involving firearms precludes a subsequent in rem forfeiture proceeding against the firearms.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1047

UNITED STATES OF AMERICA, PETITIONER

v.

ONE ASSORTMENT OF 89 FIREARMS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The en banc opinion of the court of appeals (Pet. App. 1a-14a) is reported at 685 F.2d 913. The earlier panel opinion (Pet. App. 15a-29a) is reported at 669 F.2d 206. The opinion of the district court (Pet. App. 31a-44a) is reported at 511 F. Supp. 133. An earlier opinion of the district court (Pet. App. 45a-55a) is reported at 463 F. Supp. 365.

JURISDICTION

The judgment of the court of appeals (Pet. App. 30a) was entered on August 23, 1982. The petition for a writ of certiorari was filed on December 20, 1982, and was granted on February 22, 1983 (J.A. 52). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 924(d) of Title 18 provides:

> Any firearms or ammunition involved in or used or intended to be used in, any violation of the provisions of this chapter or any rule or regulation promulgated thereunder, or any violation of any other criminal law of the United States, shall be subject to seizure and forfeiture and all provisions of the Internal Revenue Code of 1954 relating to the seizure, forfeiture, and disposition of firearms, as defined in section 5845(a) of that Code, shall, so far as applicable, extend to seizures and forfeitures under the provisions of this chapter.

STATEMENT

1. On March 31, 1977, the United States commenced an in rem civil action in the United States District Court for the District of South Carolina seeking forfeiture to the United States of an assortment of firearms seized on January 20, 1977, by Special Agents of the Bureau of Alcohol, Tobacco and Firearms. The complaint alleged (J.A. 6-7) that the firearms had been used and possessed on January 20, 1977, and prior thereto by Patrick M. Mulcahey while he was engaged in the business of dealing in firearms without a license, in violation of 18 U.S.C. 922(a)(1) and 923(a). Forfeiture was sought pursuant to 18 U.S.C. 924(d).[1]

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[1] The number of firearms involved in this action has varied somewhat with time. Federal agents seized 105 firearms from Mulcahey's residence on January 20, 1977. Pet. App. 36a. Thirteen of the 105 firearms, however, were found to have been stolen and were subsequently returned to their rightful owners. *Ibid.* The remaining 92 firearms were listed on the

Mulcahey filed a claim for recovery of the firearms and also filed an answer to the forfeiture complaint. In his answer, Mulcahey raised collateral estoppel and res judicata as a bar to the forfeiture. Mulcahey had previously been tried and acquitted of charges that he had been engaged in the business of dealing in firearms without being licensed, in violation of 18 U.S.C. 922(a)(1) and 924(a). *United States* v. *Mulcahey*, No. 77-00013 (D.S.C. Mar. 16, 1977) (Pet. App. 2a). At the criminal trial, the government's evidence showed that Mulcahey had not been issued a license to deal in firearms for the period of July 1, 1975, to March 31, 1977, but that he nevertheless bought and sold significant numbers of firearms on numerous occasions during this period (Pet. App. 33a-35a). Mulcahey testified in his own defense, admitting that he had no license (J.A. 17) and that he had bought and sold firearms during the period set forth in the indictment (J.A. 17-37). He claimed, however, that he had been entrapped into making the illegal firearms transactions (see, *e.g.*, J.A. 17-18, 23-27, 33-34). The trial court thereafter submitted the entrapment defense to the jury (J.A. 45-46). The jury returned a general verdict of not guilty.

On motion of the government in the forfeiture proceeding, the district court, per Judge Hemphill, struck Mulcahey's collateral estoppel and res judicata defenses (Pet. App. 45a-51a). Judge Hemphill noted that a "forfeiture proceeding is remedial in nature and is properly characterized as a civil proceeding"

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original complaint for forfeiture. That complaint was thereafter amended to include an additional automatic pistol, bringing the total to 93. *Id.* at 36a, 45a. Four of these guns were later returned to Mulcahey's wife, leaving 89 guns as the subject of the forfeiture proceeding. *Id.* at 36a.

(*id.* at 47a). Because of the difference in the burden of proof between civil and criminal actions, the court concluded that Mulcahey's acquittal on the criminal gun control charge " 'is not a bar to the civil administrative action by the government, which is remedial in nature, arising out of the same facts on which the criminal proceeding was based' " (Pet. App. 51a, quoting *Epps* v. *Bureau of Alcohol, Tobacco & Firearms*, 375 F. Supp. 345, 346 (E.D. Tenn. 1973); emphasis omitted).

The parties had previously stipulated that, in lieu of live testimony, the transcript of the prior criminal trial would be submitted to the court disposing of the forfeiture action (Pet. App. 2a). Upon reviewing that transcript, Judge Simons, to whom the case had been reassigned, found that Mulcahey had indeed bought and sold significant quantities of ammunition and numerous firearms without a federal license (*id.* at 33a, 39a). In agreement with Judge Hemphill's previous order in the case, Judge Simons held that a forfeiture proceeding under 18 U.S.C. 924(d) is remedial in nature and is properly characterized as a civil proceeding (Pet. App. 37a). After an extensive analysis of Mulcahey's activities, he concluded that the government had proved by a preponderance of the evidence that Mulcahey had been engaged in the business of dealing in firearms and ammunition without the required federal license (*ibid.*).[2] The firearms

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[2] Judge Simons found that the government's evidence "clearly establishes that during an eight-month period from May 13, 1976, to January 20, 1977, [Mulcahey] did engage in the business of dealing in firearms without being licensed to do so" (Pet. App. 38a). The court summarized Mulcahey's firearms transactions as follows (*ibid.*):

> (a) seven purchases of firearms on four separate occasions;

owned by Mulcahey that were used or intended to be used in violation of 18 U.S.C. 922(a)(1) were therefore found subject to forfeiture under 18 U.S.C. 924(d).[3]

(b) three offers to purchase a firearm * * * on three separate occasions;

(c) three sales of firearms on three separate occasions;

(d) seventeen offers to sell firearms (at least nine different firearms) on four occasions.

The court noted that Mulcahey "exhibited a marked inability to recall the date he acquired the seized firearms, from whom and how these firearms were acquired, and the purchase price or other things of value given * * * in exchange for each firearm" (Pet. App. 38a). The seized firearms and the guns bought and sold by Mulcahey, moreover, were "of the sort commonly dealt in by licensed dealers" (*id.* at 39a), and three or four of the transactions shown by the government involved "the same type of firearm" (*ibid.*). Mulcahey had purchased six Ruger Mini 14, .223 caliber rifles between August 21, 1976, and December 3, 1976, yet only three of these rifles "remained among those firearms seized pursuant to the warrant on January 20, 1977" (*ibid.*). The court found this "to be strong evidence of dealing in firearms, rather than collecting" (*ibid.*). Mulcahey, furthermore, held himself out as a firearms dealer when he required a government agent to fill out a federal firearms form prior to the purchase of a handgun (*id.* at 41a; J.A. 21-22). The court concluded that Mulcahey's "own statements, his course of dealing, and the wealth of circumstantial evidence in the record prove by a preponderance of the evidence that he used or intended to use all of the firearms he personally possessed as an inventory to be drawn from in the course of dealing in firearms, in violation of 18 U.S.C. § 922(a)(1)" (Pet. App. 42a-43a).

[3] The court ordered the forfeiture of 80 firearms. Nine firearms were found to be the property of various members of Mulcahey's family (Pet. App. 36a) and were not included in the forfeiture order (*id.* at 43a-44a).

2. A divided panel of the court of appeals reversed (Pet. App. 15a-29a). Relying on *Coffey* v. *United States*, 116 U.S. 436 (1886), the panel held that the forfeiture action was barred by Mulcahey's criminal acquittal because the criminal action involved "the identical facts" of the forfeiture proceeding and the "essential elements" of the forfeiture action had therefore been resolved against the government (Pet. App. 22a).

Chief Judge Winter dissented (Pet. App. 23a-29a). He concluded (*id.* at 23a) that while "*Coffey* holds that a subsequent *criminal* forfeiture is barred by an earlier acquittal on criminal charges arising out of the same facts," more recent Supreme Court decisions "compel the conclusion that the forfeiture in the present case is civil." A subsequent civil action, Judge Winter reasoned, is not barred by a criminal acquittal "because the standards of proof in criminal and civil proceedings are different" (*ibid.*). Relying on *Helvering* v. *Mitchell*, 303 U.S. 391 (1938), *Murphy* v. *United States*, 272 U.S. 630 (1926), and *Stone* v. *United States*, 167 U.S. 178 (1897), Judge Winter concluded that "if the forfeiture proceeding is civil in nature," res judicata does not bar the civil action, and "the standard of proof argument, by itself, is enough to defeat any resort to collateral estoppel" (Pet. App. 24a). Judge Winter noted that the rationale adopted by the majority was rejected in *One Lot Emerald Cut Stones* v. *United States*, 409 U.S. 232 (1972), because the forfeiture provision at issue in that case was found to be civil in nature. He contended that similar reasoning controlled in this case. "The forfeiture statute here, 18 U.S.C. § 924(d), was manifestly designed to aid in the enforcement of gun control laws by preventing the circulation of firearms which had been illegally obtained. *One Lot Emerald*

Cut Stones thus compels the conclusion that the forfeiture at issue here is civil in nature, so that the double jeopardy and res judicata claims must be rejected. It matters not, despite the majority's views, that the necessary allegations in the criminal proceeding and the forfeiture proceeding were identical" (Pet. App. 27a; footnote omitted).

3. On rehearing en banc the court of appeals adhered to the panel decision by a 5-4 vote (Pet. App. 1a-14a). The majority again specifically relied on *Coffey* and rejected the government's argument that a prior criminal acquittal does not bar a subsequent civil forfeiture proceeding (*id.* at 3a-5a). The majority reasoned that the "issue of whether the firearms were used or intended to be used in violation of the [Gun Control] Act was tried in [the criminal prosecution] and conclusively decided" (*id.* at 7a). The court further concluded that the sanction at issue here is criminal in nature, relying on the fact that the forfeiture provision is contained in 18 U.S.C. (& Supp. V) 924 and "[e]verything in § 924 provides a penalty, be it fine, prison or forfeiture, for the violation of a provision of the Gun Control Act" (Pet. App. 9a-10a). The court distinguished *Helvering* v. *Mitchell* and other Supreme Court precedent providing for civil penalties subsequent to a criminal acquittal on the ground that "[t]here is nothing remedial about forfeiture under § 924(d)" (Pet. App. 10a).

Judge Winter, joined by three others, again dissented. Relying in large part on the analysis of his dissent at the panel stage, Judge Winter also noted that the "majority errs when it confidently asserts that the jury verdict in the criminal action conclusively settled the issue that Mulcahey was not engaged in the business of dealing in firearms without a li-

cense" (Pet. App. 13a). Because of Mulcahey's assertion of entrapment, "it is equally possible that the jury found that Mulcahey was engaged in the business of dealing in firearms without a license, but had been entrapped into commiting an illegal sale, as [that it] found that Mulcahey was not so engaged" (*ibid.*). Judge Winter also remained convinced that "the forfeiture provisions of 18 U.S.C. § 924(d) are civil in nature so that *any* determination in the criminal prosecution is irrelevant to a decision of forfeiture" (Pet. App. 13a; emphasis in original). This conclusion is reinforced, Judge Winter reasoned, by the fact that the forfeiture provision is significantly broader in scope than the criminal sanctions of the Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213 (Pet. App. 13a-14a). Section 924(d) provides "disjunctively that 'Any firearm involved in or used or *intended to be used* in, any violation of this chapter * * * shall be subject to seizure and forfeiture * * *' (emphasis added). * * * Nothing in the provision of § 922 under which Mulcahey was prosecuted renders an *intention* to engage in the business of dealing in firearms without a license illegal" (Pet. App. 13a-14a; footnote omitted).

INTRODUCTION AND SUMMARY OF ARGUMENT

Section 924(d) of Title 18 of the United States Code provides for the seizure and forfeiture of "[a]ny firearm or ammunition involved in or used or intended to be used in, any violation of [federal gun control law]." Relying solely on *Coffey* v. *United States*, 116 U.S. 436 (1886), the court of appeals ruled that an acquittal on criminal firearms charges bars a subsequent forfeiture action under 18 U.S.C. 924(d), notwithstanding the fact that forfeiture actions under Section 924(d) have traditionally been subject to the

preponderance of evidence standard of proof rather than the much stricter criminal standard. Although the doctrinal basis for its preclusion rule is unclear, the lower court's decision rests on the premise that "[t]he criminal verdict conclusively decided that the firearms * * * were not 'involved in or used or intended to be used in the violation'" of federal law (Pet. App. 8a). This factual resolution, the court concluded, is binding on all subsequent judicial proceedings involving the firearms and bars the forfeiture action here.

The premise and conclusion of the court of appeals conflict with controlling legal precedent and are faulty as a matter of logic. An acquittal, of course, establishes only that the government has not shown beyond a reasonable doubt that certain facts exist; it does not "conclusively" establish (Pet. App. 7a, 8a) that those facts do not exist. *Helvering* v. *Mitchell*, 303 U.S. 391, 397 (1938). The decisions of this Court, therefore, clearly hold that a criminal acquittal does not bar a subsequent "civil action requiring a different degree of proof." *Helvering*, 303 U.S. at 405. The court of appeals, in apparent recognition of this rule, concluded that a forfeiture under 18 U.S.C. 924(d) is neither "civil" (Pet. App. 12a) nor "remedial" (*id.* at 10a). This determination, however, is at odds with the longstanding view that in rem forfeiture actions are civil penalties (*Helvering*, 303 U.S. at 400; *Various Items of Personal Property* v. *United States*, 282 U.S. 577, 580-581 (1931)), and with the explicit conclusion of numerous other circuits that 18 U.S.C. 924(d) embodies a remedial, civil sanction. *E.g.*, *Glup* v. *United States*, 523 F.2d 557, 561 (8th Cir. 1975).

It is beyond serious dispute that a *civil* action is not barred by a prior criminal acquittal involving the

same conduct, whether the asserted ground for preclusion be identified as res judicata, double jeopardy, collateral estoppel, or the decision in *Coffey*. See *One Lot Emerald Cut Stones* v. *United States*, 409 U.S. 232, 235-237 (1972); *Helvering*, 303 U.S. at 397-406. The actual bone of contention in this litigation, therefore, is whether 18 U.S.C. 924(d) imposes a civil or criminal penalty. See *United States* v. *Ward*, 448 U.S. 242, 248 (1980). The decisions of this and other courts, however, clearly indicate that the forfeiture provision at issue here was designed as a remedial, civil measure to remove dangerous weapons from unregulated channels of commerce. *Huddleston* v. *United States*, 415 U.S. 814, 824-825 (1974). Congress provided civil procedures for enforcing the sanction, and forfeiture itself is not so punitive in purpose or effect as to require classification as a criminal penalty.

The fact that some proprietary forfeitures can be termed "quasi-criminal," moreover, does not support the decision below. Although this Court has applied the "quasi-criminal" label in determining whether the fundamental protections against unreasonable searches and seizures and self-incrimination apply to forfeiture proceedings (*United States* v. *United States Coin & Currency*, 401 U.S. 715 (1971); *One 1958 Plymouth Sedan* v. *Pennsylvania*, 380 U.S. 693 (1965); *Boyd* v. *United States*, 116 U.S. 616 (1886)), those cases simply do not transform forfeiture proceedings into criminal actions for all constitutional and procedural purposes. *Ward*, 448 U.S. at 251-255; *One Lot Emerald Cut Stones*, 409 U.S. at 237.

ARGUMENT

I. THE DECISION IN *COFFEY* v. *UNITED STATES* DOES NOT COMPEL PRECLUSION OF A CIVIL FORFEITURE ACTION FOLLOWING A CRIMINAL ACQUITTAL

The decision of the en banc court below rests squarely upon a single aged precedent—*Coffey* v. *United States*, *supra*. *Coffey* is, however, a slender reed upon which to hang the entire weight of the preclusion rule fashioned by the court of appeals. Indeed, the more recent opinions of this Court demonstrate that the broad preclusion doctrine announced in *Coffey* no longer retains independent vitality.

The Court in *Coffey* held that a forfeiture action brought against certain distilling equipment was barred by the owner's prior acquittal on charges of removing and concealing distilled spirits with the intent to defraud the revenue.[4] The Court found that "where an issue raised as to the existence of the act or fact denounced has been tried in a criminal proceeding, instituted by the United States, and a judgment of acquittal has been rendered in favor of a particular person, that judgment is conclusive in favor of such person, on subsequent trial of a suit *in rem* by the United States, where, as against him, the existence of the same act or fact is the matter in issue, as a cause for the forfeiture of the property prosecuted in such suit *in rem*" (116 U.S. at 443).

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[4] The statute at issue in *Coffey* provided that whenever any person engaged in the distilling business "defraud[s] * * * the United States of the tax on the spirits distilled by him * * * he shall forfeit the distillery and distilling apparatus * * * and shall be fined * * * and be imprisoned" (116 U.S. at 437).

The *Coffey* Court experienced some difficulty in explicating the rationale behind the broad rule of preclusion announced by the case. Although the Court had concluded in a pair of earlier decisions that nominally civil penalty proceedings, brought subsequent to a criminal acquittal, were barred by double jeopardy considerations (*United States* v. *Chouteau*, 102 U.S. 603, 611-612 (1881); *United States* v. *Ulrici*, 102 U.S. 612 (1881)), the *Coffey* Court did not cite those cases or explicitly ground its opinion on Fifth Amendment principles. Rather, the Court appeared to base its decision on notions of collateral estoppel. The Court did note that one argument against giving a criminal acquittal preclusive effect was the fact that an acquittal "may have taken place because of the rule requiring guilt to be proven beyond a reasonable doubt, and that, on the same evidence, on the question of preponderance of proof, there might be a verdict for the United States * * *" (116 U.S. at 443). But it nevertheless concluded that the differing standards of proof between a criminal prosecution and a civil forfeiture action did not prevent preclusion because "the fact or act has been put in issue and determined against the United States; and all that is imposed by the statute, as a consequence of guilt, is a punishment therefor. There could be no new trial of the criminal prosecution after the acquittal in it; and a subsequent trial of the civil suit amounts to substantially the same thing, with a difference only in the consequences following a judgment adverse to the claimant" (*ibid.*).

Coffey has remained something of an enigma, because the Court did not specify the legal foundation for the preclusion rule developed in the opinion. Was the forfeiture action barred by res judicata? Collat-

eral estoppel? Double jeopardy? Subsequent courts and commentators have been uncertain. See generally 1B J. Moore & T. Currier, *Moore's Federal Practice* ¶ 0.418[3] (2d ed. 1982); Annot., 27 A.L.R.2d 1137, 1138-1140 (1953).[5] See also *United States* v. *One Dodge Sedan*, 113 F.2d 552, 553 (3d Cir. 1940) (collecting numerous cases and law review articles criticizing *Coffey*). The decision can be read broadly as precluding any subsequent court action brought by the government that is based upon the same "act[s] or fact[s]" (116 U.S. at 443) involved in a prior criminal prosecution. The decision can also be read considerably more narrowly, as precluding only the imposition of criminal punishments following a criminal acquittal. See, *e.g.*, 116 U.S. at 443 ("all that is imposed by the statute, as a consequence of guilt, is a punishment therefor"). Compare *United States* v. *La Franca*, 282 U.S. 568, 572, 575 (1931) (civil suit brought to collect a tax for the illegal sale of liquor is precluded by a prior criminal *conviction* because the tax was held to be merely an additional "punishment for infraction of the law"). Although the court of appeals adopted a broad reading of *Coffey*, the decisions of this Court since 1886 have plainly restricted the case to the narrow grounds just stated.

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[5] "Neither the Coffey case nor subsequent cases applying its rule appear to have decided whether it is founded upon broad res judicata principles or upon the rules as to double jeopardy or autrefois acquit. The difference in the burden of proof imposed upon the government in the two proceedings, and at least technical differences in the parties and issues, logically preclude an application of res judicata; and if double jeopardy is relied upon, it is difficult to explain the numerous cases holding that a prior conviction is no bar to a subsequent forfeiture." 27 A.L.R.2d at 1139 (footnotes omitted).

One Lot Emerald Cut Stones, 409 U.S. at 235; *Helvering*, 303 U.S. at 405-406; *Murphy* v. *United States*, 272 U.S. 630, 631-632 (1926); *Stone* v. *United States*, 167 U.S. 178, 186-187 (1897).

In *Helvering* v. *Mitchell*, the Court was faced with an action to recover a substantial monetary penalty for fraudulent avoidance of income tax. The defendant argued that his prior acquittal on charges of willfully attempting to evade and defeat the tax precluded the subsequent penalty action. The court of appeals, relying principally on *Coffey*, agreed and held that the penalty action was precluded (see 303 U.S. at 396). This Court, in an opinion by Justice Brandeis, reversed.

The defendant in *Helvering* advanced three basic arguments: (1) that the second penalty action was barred by "res judicata" (apparently used in a broad sense as including collateral estoppel, see 303 U.S. at 397); (2) that the penalty action was barred by the Double Jeopardy Clause (*id.* at 398); and (3) that the *Coffey* decision required preclusion (*id.* at 405). The Court rejected each argument.

The res judicata and collateral estoppel arguments were quickly dispatched by the *Helvering* Court. The Court simply reversed the position taken in *Coffey* and concluded that differences between the burdens of proof in criminal and civil actions do prevent application of res judicata or collateral estoppel to civil suits brought following a criminal acquittal. Compare 116 U.S. at 443 with 303 U.S. at 397. See also *United States* v. *$2,500 in United States Currency*, 689 F.2d 10, 15 (2d Cir. 1982) (*Helvering* "reject[s] the holding of *Coffey*"). "The difference in degree of the burden of proof in criminal and civil cases precludes application of the doctrine of *res judicata*.

The acquittal was 'merely * * * an adjudication that the proof was not sufficient to overcome all reasonable doubt of the guilt of the accused.' * * * That acquittal on a criminal charge is not a bar to a civil action by the Government, remedial in its nature, arising out of the same facts on which the criminal proceeding was based has long been settled." *Helvering*, 303 U.S. at 397. See also *One Lot Emerald Cut Stones*, 409 U.S. at 235 ("the difference in the burden of proof in criminal and civil cases precludes application of the doctrine of collateral estoppel"); *Murphy* v. *United States*, *supra*, 272 U.S. at 632-633 ("the judgment in the criminal case does not make the issues in the present [civil case] *res judicata*"); *Stone* v. *United States*, *supra*, 167 U.S. at 188 ("In the criminal case [the petitioner's] acquittal may have been due to the fact that the Government failed to show, beyond a reasonable doubt, the existence of some fact essential to establish the offense charged, while the same evidence in a civil action * * * might have been sufficient to entitle the Government to a verdict").

The *Helvering* Court similarly rejected the defendant's double jeopardy argument on the ground that the second penalty action was civil, not criminal, in nature. "Congress may impose both a criminal and a civil sanction in respect to the same act or omission * * *. The question for decision is thus whether [the second action] imposes a criminal sanction." 303 U.S. at 399. Using an analysis quite similar to the one employed in more recent decisions of this Court (*e.g.*, *Ward*, 448 U.S. at 248, 250), the *Helvering* Court concluded that "[f]orfeiture of goods or their value or the payment of fixed or variable sums of money" are civil sanctions because they have

historically been "enforcible by civil proceedings" (303 U.S. at 400). See also *Various Items of Personal Property* v. *United States*, *supra*, 282 U.S. at 581 (Fifth Amendment's Double Jeopardy Clause does not apply to in rem forfeitures).

Finally, the *Helvering* Court rejected the notion that *Coffey* mandated preclusion of the second suit. The Court stated flatly that "the rule of the *Coffey* case '[does] not apply to a situation where there ha[s] been an acquittal on a criminal charge followed by a civil action requiring a different degree of proof' " (303 U.S. at 405). See also *United States* v. *$8,850*, No. 81-1062 (May 23, 1983), slip op. 5, 14 (Court remands civil forfeiture action for further proceedings notwithstanding claimant's prior acquittal on criminal charges involving the property subject to forfeiture); *One Lot Emerald Cut Stones*, 409 U.S. at 237 (same). As Judge Winter correctly noted in his original dissent from the panel opinion, *Coffey* bars only a "subsequent criminal forfeiture * * * arising out of the same facts" as an earlier criminal acquittal (Pet. App. 23a).[6] *Coffey* therefore does not—contrary to the apparent conclusion of the court of appeals (Pet. App. 7a)—bar all judi-

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[6] This is the sole aspect of the *Coffey* decision that has any continuing vitality today. One need not, however, reach as far back as *Coffey* for expressions of the above rule. See, *e.g.*, *Ashe* v. *Swenson*, 397 U.S. 436, 445-447 (1970) (collateral estoppel is embodied in the Fifth Amendment guarantee against double jeopardy); *Rex Trailer Co., Inc.* v. *United States*, 350 U.S. 148, 148-152 (suit brought to recover monetary penalty following conclusion of a criminal prosecution is civil in nature and does not violate a defendant's double jeopardy rights); *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 548-550 (1943) (same).

cial inquiry into the "same act[s] or fact[s]" (116 U.S. at 443) that were the subject of a criminal prosecution. *Coffey* demands preclusion only where a subsequent penalty proceeding is properly deemed to be criminal in nature. 1B J. Moore & T. Currier, ¶ 418[3], at 2856.

II. FORFEITURE UNDER 18 U.S.C. 924(d) IS A CIVIL, REMEDIAL PENALTY

Because the decisions of this Court unequivocally establish that a criminal acquittal does not preclude a subsequent civil action founded on the same facts, the crucial question in this case is whether forfeiture under 18 U.S.C. 924(d) is a civil, remedial penalty. Based on two rather limited considerations, the court below concluded that 18 U.S.C. 924(d) is neither. The court reasoned that forfeiture under Section 924(d) is not "civil" because it "is a part of the 'Penalties' section of the law" (Pet. App. 9a). It next concluded that there is nothing "remedial" about the statute because following forfeiture the "firearms are destroyed" (*id.* at 10a). See 26 U.S.C. 5872(b). This perfunctory analysis is plainly insufficient. The fact that forfeiture is listed as a "penalty" is not, of course, determinative of whether it is a civil or a criminal penalty. Moreover, the fact that forfeited firearms are sometimes destroyed does not negate the remedial congressional purpose behind the forfeiture itself. A more balanced and careful analysis leads to a result directly opposite to the court of appeals' conclusion.

"This Court has often stated that the question whether a particular statutorily-defined penalty is civil or criminal is a matter of statutory construction." *Ward*, 448 U.S. at 248. See also *One Lot*

Emerald Cut Stones, 409 U.S. at 237; *Helvering*, 303 U.S. at 399. The Court's inquiry in this regard has "traditionally proceeded on two levels." *Ward*, 448 U.S. at 248. First, the Court has sought to determine whether Congress "indicated either expressly or impliedly a preference for one label or the other" (*ibid.*). Second, when Congress has indicated its intention to establish a civil penalty, the Court has inquired "whether the statutory scheme was so punitive either in purpose or effect as to negate that intention" (*id.* at 248-249). This analysis plainly indicates the civil, remedial nature of the forfeiture penalty established by Section 924(d).

A. The Procedures for Executing a Forfeiture Under 18 U.S.C. 924(d) and the Rationale Behind the Sanction Itself Evidence Congress' Intent to Create a Civil, Remedial Penalty

1. Forfeitures "have been recognized as enforcible by civil proceedings since the original revenue law of 1789." *Helvering*, 303 U.S. at 400. The historical roots of modern in rem forfeiture actions, as well as the express legislative structure of 18 U.S.C. 924(d), evidence the undeniably civil nature of the forfeiture action at issue here.

The historical origins of the law of forfeiture were most recently traced by this Court in *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 680-690 (1974). In the course of that opinion, the Court noted that early English law provided for two basic types of forfeiture: forfeiture resulting from "conviction for felonies and treason," and "statutory forfeitures of offending objects used in violation of the customs and revenue laws" (416 U.S. at 682). Forfeiture based upon a felony conviction, a form of forfeiture that has not been generally adopted into

American law (see U.S. Const. Art. III, § 3; 18 U.S.C. 3563; Rev. Stat. 5326 (1874 ed); 1 Stat. 117)), "did not, strictly speaking, attach *in rem*; but it was a part, or at least a consequence, of the judgment of conviction." *The Palmyra*, 25 U.S. (12 Wheat.) 1, 14 (1827).[7] Statutory forfeitures, by contrast, were enforced in the Court of Exchequer by means of civil in rem procedures operating directly against the item to be forfeited. *Calero-Toledo*, 416 U.S. at 682. The item to be forfeited was "considered as the offender," and the proceeding in rem stood "independent of, and wholly unaffected by any criminal proceeding *in personam*." *The Palmyra*, 25 U.S. at 14-15. Unlike forfeitures based upon conviction of a felony, moreover, statutory forfeitures became a part of American jurisprudence "'[l]ong before the adoption of the Constitution'" (*Calero-Toledo*, 416 U.S. at 683, quoting *C. J. Hendry Co.* v. *Moore*, 318 U.S. 133, 139 (1943)) and have been consistently regarded as civil proceedings, separate and apart from any criminal prosecution. Indeed, precisely because a statutory in rem forfeiture "is no part of the punishment for the criminal offense," this Court has held that "[t]he provision of the Fifth Amendment to the Constitution in respect of double jeopardy does not apply" to in rem forfeiture actions (*Various Items of Personal Property* v. *United States*, 282 U.S. 577, 581 (1931)), and the "innocence of the owner of property subject to forfeiture has almost uniformly been rejected as a defense" (*Calero-Toledo*, 416 U.S. at 683).

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[7] The "convicted felon forfeited his chattels to the Crown and his lands escheated to his lord," while the "convicted traitor forfeited all of his property, real and personal, to the Crown" (*Calero-Toledo*, 416 U.S. at 682).

Congress was certainly aware of this history when it enacted 18 U.S.C. 924(d). Although Section 924 lists forfeiture as a "penalty," the congressional reports on the legislation reflect Congress' knowledge of the distinction between traditional criminal sanctions and the in rem forfeiture penalty provided by Section 924(d). Both the Senate and House reports state that Section 924 "contains the penalty and forfeiture provisions," clearly indicating that Congress was cognizant of the fact that an in rem statutory forfeiture "is no part of the punishment for the criminal offense." *Various Items of Personal Property* v. *United States*, *supra*, 282 U.S. at 581.[8]

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[8] Where Congress has intended to create a criminal rather than a civil in rem forfeiture, it has expressly provided for such a result. The Racketeer Influenced and Corrupt Organizations Act (RICO), for example, contains both civil (18 U.S.C. 1964) and criminal (18 U.S.C. 1963) penalties, with forfeiture listed as a criminal penalty contingent upon conviction (18 U.S.C. 1963(a)). The legislative reports on RICO, furthermore, demonstrate Congress' sensitivity to the distinction between criminal forfeitures and civil in rem forfeitures. As the Senate report noted (S. Rep. No. 92-617, 91st Cong., 1st Sess. 79-80 (1969)):

> The concept of forfeiture as a criminal penalty which is embodied in [Section 1963(a)] differs from other presently existing forfeiture provisions under Federal statutes where the proceeding is *in rem* against the property and the thing which is declared unlawful under the statute, or which is used for an unlawful purpose, or in connection with the prohibited property or transaction, is considered the offender, and the forfeiture is no part of the punishment for the criminal offense * * *
>
> Under the criminal forfeiture of section 1963 * * * the proceeding is *in personam* against the defendant who is the party to be punished upon conviction of violation of any provision of the section, not only by fine and/or im-

Congress' intent that Section 924(d) be regarded as a civil rather than a criminal penalty is most clearly evidenced, however, by the procedural mechanisms it established for enforcing forfeitures under the statute. Section 924(d) does not prescribe the steps to be followed in effectuating a forfeiture, but rather incorporates by reference the procedures of the Internal Revenue Code of 1954.[9] The Internal Revenue Code provides that proceedings to enforce forfeitures "shall be in the nature of a proceeding in rem in the United States District Court for the district where such seizure is made" (26 U.S.C. 7323). As outlined above, in rem actions are, by their very nature, civil proceedings, with jurisdiction dependent upon seizure of a physical object, in contrast with the in personam nature of criminal actions. See *Calero-Toledo*, 416 U.S. at 684.

In addition to the in rem nature of the action, the Internal Revenue Code provides a summary, administrative proceeding for forfeiture of seized goods

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prisonment, but also by forfeiture of all interest in the [RICO] enterprise.

See also *United States* v. *McManigal*, No. 82-1754 (7th Cir. May 19, 1983), slip op. 20 ("the forfeiture of a portion of a person's property as a consequence of a criminal conviction was unknown to the federal criminal law until the passage of [RICO]"); 1 C. Wright, *Federal Practice & Procedure* § 125.1, at 389 (2d ed.) ("[u]ntil [the passage of RICO] American law did not use the concept of a 'criminal forfeiture' ").

[9] Section 924(d) provides that "all provisions of the Internal Revenue Code of 1954 relating to the seizure, forfeiture, and disposition of firearms" apply to "forfeitures under the provisions of this chapter." Chapter 75, subch. C, Part II of the Internal Revenue Code of 1954 contains the procedural "Provisions Common to Forfeitures." 26 U.S.C. 7321-7328.

valued at $2,500 or less. See 26 U.S.C. 7325 (requiring the filing of a claim and posting of a bond in order to obtain judicial proceedings regarding forfeiture of goods valued at less than $2,500). See also 27 C.F.R. 72.22-72.26 (Bureau of Alcohol, Tobacco and Firearms regulations detailing the procedures for administrative forfeiture of seized firearms). Notice of a seizure under 18 U.S.C. 924(d) may be provided by publication (26 U.S.C. (& Supp. V) 6325; 27 C.F.R. 72.22(a)(3)), and the Bureau of Alcohol, Tobacco and Firearms is empowered to remit or mitigate a forfeiture under the administrative procedures applicable to "forfeitures under the custom laws." 26 U.S.C. 7327; 27 C.F.R. 72.31. See generally *United States* v. *$8,850*, *supra*, slip op. 2-3. Such procedures plainly could not be utilized in a criminal action. "That Congress provided a distinctly civil procedure for [forfeitures under 18 U.S.C. 924(d)] indicates clearly that it intended a civil, not a criminal, sanction." *Helvering*, 303 U.S. at 402.[10]

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[10] In line with the civil procedural rules governing forfeitures under 18 U.S.C. 924(d), it is well established that the government need establish its case only by a preponderance of the evidence. *United States* v. *86 Firearms*, 623 F.2d 643, 644 (10th Cir. 1980). In accordance with cases construing the burden of proof under other federal forfeiture statutes (*e.g.*, *United States* v. *$83,320 in United States Currency*, 682 F.2d 573, 576-577 (6th Cir. 1982) (21 U.S.C. (Supp. V) 881(a)(6)); *United States* v. *$364,960 in United States Currency*, 661 F.2d 319, 324 (5th Cir. 1981) (21 U.S.C. (Supp. V) 881(a)(6)); *United States* v. *One 1974 Porsche 911-S*, 682 F.2d 283, 285 (1st Cir. 1982) (21 U.S.C. 881(a)(4)); *United States* v. *One 1977 Lincoln Mark V Coupe*, 643 F.2d 154, 156 (3d Cir.), cert. denied, 454 U.S. 818 (1981) (21 U.S.C. 881(a)(4)); *United States* v. *One 1972 Toyota Mark II*, 505 F.2d 1162, 1164 (8th Cir. 1974) (21 U.S.C. 881(a)(4));

2. The fact that civil rather than criminal procedures apply to a Section 924(d) forfeiture is not the only evidence that the sanction cannot be deemed a criminal penalty. Although the court of appeals found "nothing remedial about forfeiture under § 924(d)" (Pet. App. 10a), the section in fact furthers a broadly remedial aim: the elimination of widespread, unregulated commerce in lethal weapons.

Section 924(d) was first enacted in Title IV of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, Section 901, 82 Stat. 233, which this Court has previously described as a "carefully constructed package of gun control legislation." *Scarborough* v. *United States*, 431 U.S. 563, 570 (1977). See also *Dickerson* v. *New Banner Institute*, No. 81-1180 (Feb. 23, 1983), slip op. 16. Later that same year, Congress strengthened the provisions of Title IV by extending its proscriptions to rifles, shotguns, and ammunition. Gun Control Act of 1968,

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United States v. *$3,799 in United States Currency*, 684 F.2d 674, 678 (10th Cir. 1982) (26 U.S.C. 7302); *United States* v. *Fields*, 425 F.2d 883, 885 (3d Cir. 1970) (49 U.S.C. 782)), two district courts have concluded that once the government has shown probable cause to justify a forfeiture under Section 924(d), the burden of proof shifts to the claimant. *United States* v. *14 Handguns*, 524 F. Supp. 395, 397 (S.D. Tex. 1981); *United States* v. *26 Firearms*, 485 F. Supp. 549, 551 (W.D. Pa. 1980), aff'd, 639 F.2d 777 (3d Cir. 1980) (table). Courts, furthermore, regularly grant summary judgment in favor of the government (*e.g.*, *United States* v. *Various Firearms*, 523 F.2d 47, 48 (7th Cir. 1975)), and routinely permit the government to appeal from an adverse decision in a forfeiture case—something that would be impermissible if the forfeiture action were "criminal." See, *e.g.*, *United States* v. *Walter*, 638 F.2d 947 (6th Cir. 1981); *United States* v. *One Assortment of Seven Firearms*, 632 F.2d 1276 (5th Cir. 1980).

Pub. L. No. 90-618, 82 Stat. 1213. Section 924(d) was retained in this later legislation without alteration.

When Congress enacted the 1968 gun control legislation, "it was concerned with the widespread traffic in firearms and with their general availability to those whose possession thereof was contrary to the public interest." *Huddleston* v. *United States*, 415 U.S. 814, 824 (1974). Congress concluded that "the ease with which firearms could be obtained contributed significantly to the prevalence of lawlessness and violent crime in the United States." *Ibid.*, citing S. Rep. No. 1097, 90th Cong., 2d Sess. 108 (1968). The Gun Control Act of 1968, in particular, was designed to "control the indiscriminate flow" of firearms across state borders and to "assist and encourage States and local communities to adopt and enforce stricter gun control laws." H.R. Rep. No. 1577, 90th Cong., 2d Sess. 8 (1968). The 1968 gun control legislation is "thus aimed at restricting public access to firearms." *Huddleston*, 415 U.S. at 824.

As this Court has previously recognized, the "principal agent of federal [gun control] enforcement is the dealer." *Huddleston*, 415 U.S. at 824. All commerce in ammunition and firearms is channeled through federally licensed dealers, "the focus of the federal scheme," in order "to eliminate the mail order and the generally widespread commerce in [firearms], and to insure that, in the course of sales or other dispositions by these dealers, weapons [will] not be obtained by individuals whose possession of them would be contrary to the public interest." *Id.* at 825; *Dickerson* v. *New Banner Institute*, *supra*, slip op. 5. Section 924(d) plays an important role in furthering the "broad prophylactic purpose" of the 1968 gun control legislation (*Dickerson* v. *New*

Banner Institute, supra, slip op. 15) by eliminating stocks of firearms that have been used or intended for use outside regulated channels of commerce.

Firearms that are found subject to forfeiture under 18 U.S.C. 924(d) may be destroyed. See 26 U.S.C. 7326, 5872(b). The court of appeals concluded that this fact demonstrated that Section 924(d) could not be viewed as a remedial sanction (Pet. App. 10a). The possible destruction of forfeited weapons, however, reinforces rather than negates the remedial purpose behind the provision. The forfeiture sanction provided by Congress in Section 924(d) is not merely punitive; it is designed to discourage unregulated commerce in firearms and to remove from circulation firearms that have been either illegally obtained and distributed or set apart for such use. As the Second Circuit has stated, the forfeiture sanction is designed "to keep potentially dangerous weapons out of the hands of unlicensed dealers." *United States* v. *16,179 Moslo Italian .22 Caliber Winlee Derringer Convertible Starter Guns*, 443 F.2d 463, 466 (2d Cir.), cert. denied, 404 U.S. 983 (1971).[11]

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[11] The court of appeals' assertion that forfeited firearms are invariably destroyed (Pet. App. 10a) is not in fact entirely accurate. 26 U.S.C. 7326 provides that forfeited firearms will be disposed of in accordance with the provisions of 26 U.S.C. 5872(b). Section 5872(b) provides that, if there is no administrative remission or mitigation, forfeited firearms will be either destroyed, sold to a state government, or transferred "without charge to any executive department or independent establishment of the Government for use by it." Cf. 41 C.F.R. 101-48.303 (forfeited firearms will not be sold to state governments except as scrap). Thus, contrary to the court of appeals' statement that forfeiture cannot be remedial because the "firearms do not go into the public treasury" (Pet. App.

Section 924(d), finally, is materially broader in scope than the criminal provisions of the 1968 gun control legislation. The criminal provisions of 18 U.S.C. 922 proscribe only completed, specifically delineated acts. For example, 18 U.S.C. 922(a)(1), the section under which Mulcahey was indicted, outlaws only the completed act of engaging in the business of dealing in firearms without a license. By contrast, the forfeiture sanction reaches firearms that are merely "intended to be used" in violation of the law. Section 924(d), therefore, reaches a broader range of conduct than the criminal provisions of the gun control act, and that breadth "is persuasive evidence that Congress did not intend forfeitures to be an additional penalty for the commission of a criminal act but rather that they be a separate civil sanction, remedial in nature" (Pet. App. 14a, Winter, C.J., dissenting). Section 924(d) was designed to remove dangerous goods from illegal channels of commerce, and the court of appeals' narrow, contrary construction of the section is not "consonant with the achievement of [the] congressional objective [behind the 1968 gun control legislation]" (*Huddleston*, 415 U.S. at 825).

3. Consistent with the above analysis, at least six circuits have concluded that 18 U.S.C. 924(d) embodies a civil sanction.[12] Because of the civil nature

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10a), forfeited firearms may, in a very real sense, " 'reimburse the Government for the heavy expense of investigation' " of a gun control violation (*ibid.*, quoting *Helvering*, 303 U.S. at 401) since the federal government can and does use the forfeited firearms.

[12] *United States* v. *16,175 Moslo Italian .22 Caliber Winlee Derringer Convertible Starter Guns*, *supra*, 443 F.2d at 466; *United States* v. *One Assortment of Seven Firearms*, 632 F.2d

of an in rem forfeiture proceeding, these cases recognize that the government's burden under Section 924(d) "is to establish its case by a preponderance of the evidence." *United States* v. *86 Firearms*, 623 F.2d 643, 644 (10th Cir. 1980). The decisions, moreover, reflect the fact that Section 924(d)'s remedial civil forfeiture sanction was designed by Congress to reach activities outside the criminal provisions of the 1968 Gun Control Act. See, *e.g.*, *United States* v. *One Assortment of Seven Firearms*, 632 F.2d 1276, 1278 (5th Cir. 1980) (because Section 924(d) reaches firearms that are merely "intended to be used" in violation of federal gun control law, forfeiture may be ordered even where no actual criminal violation occurs). While none of the above cases undertakes an analysis as extensive as the one set out in this brief, the unanimous conclusion of six courts of appeals that Section 924(d) provides a civil penalty is persuasive evidence that the forfeiture in this case is not, as the court below concluded, "criminal in nature" (Pet. App. 9a). To the contrary, as the Eighth Circuit stated in *Glup* v. *United States*, *supra*, 523 F.2d at 561, "[i]t is well established that a forfeiture proceeding under 18 U.S.C. § 924(d) is remedial in nature and is properly characterized as a civil proceeding." [13]

1276, 1278 (5th Cir. 1980); *United States* v. *Walters*, 638 F.2d 947, 950 (6th Cir. 1981); *United States* v. *One Heckler-Koch Rifle*, 629 F.2d 1250, 1251 (7th Cir. 1980); *United States* v. *Various Firearms*, 523 F.2d 47, 48 (7th Cir. 1975); *Glup* v. *United States*, 523 F.2d 557, 561 (8th Cir. 1975); *United States* v. *86 Firearms*, 623 F.2d 643, 644 (10th Cir. 1980).

[13] In *Glup*, the owner of an assortment of firearms forfeited under Section 924(d) brought an action to recover the weapons following his acquittal on criminal firearms charges. The court

B. Forfeiture Under Section 924(d) is not so Punitive in Purpose or Effect as to Require Classification as a Criminal Penalty

The procedures prescribed by Congress for executing forfeitures under Section 924(d) and the congressional purpose behind the sanction all evidence Congress' intent that 18 U.S.C. 924(d) be classified as a civil rather than a criminal penalty. The sanction, moreover, is not "so punitive either in purpose or effect as to negate that intention" (*Ward*, 448 U.S. at 249).

Whether a nominally civil remedy in reality imposes a criminal penalty is rarely self-evident. The Court has rightly noted that "sometimes it is hard to

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of appeals held that forfeiture was proper notwithstanding the acquittal because "[n]one of the six counts on which appellant was acquitted involved the previously forfeited firearms" (523 F.2d at 561). In dictum, however, the court addressed the precise issue presented by this case, concluding that even if the criminal trial and the forfeiture action had involved the same firearms, the criminal acquittal would not affect the civil forfeiture action (*ibid.*). At least one district court has likewise held that a forfeiture under 18 U.S.C. 924(d) may follow an acquittal on related criminal gun control charges. *United States* v. *One Assortment of 12 Rifles & 21 Handguns*, 313 F. Supp. 641, 642 (N.D. Fla. 1970). Several other district courts have so stated in dictum. *United States* v. *26 Firearms*, 485 F. Supp. 549, 551 (W.D. Pa. 1980), aff'd, 639 F.2d 771 (3d Cir. 1980) (table) ("Forfeiture has been awarded even where there was an acquittal on the underlying violation of criminal statutes"); *United States* v. *Ten Firearms and Twenty-Four Rounds of Ammunition*, 444 F. Supp. 305, 308-309 (N.D. Tex. 1977) (acquittal on criminal gun control charges does not bar forfeiture under Section 924(d)); *United States* v. *57 Miscellaneous Firearms*, 422 F. Supp. 1066, 1070 n.2 (W.D. Mo. 1976) ("[i]t is even possible to suffer a civil forfeiture under 18 U.S.C. 924(d) if the defendant stands trial and is acquitted on the criminal charge").

say how a given detriment imposed by the law shall be regarded." *Murphy* v. *United States, supra*, 272 U.S. at 632. The mere fact that a certain sanction "is imposed in consequence of a crime is not conclusive" (*ibid.*), because " '[p]unishment, in a certain and very limited sense, may be the result of [any] statute * * * so far as the wrong-doer is concerned,' but this is not enough to label it as a criminal statute." *U.S. ex rel. Marcus* v. *Hess, supra*, 317 U.S. at 551, quoting *Brady* v. *Daly*, 175 U.S. 148, 157 (1899).

The Court, therefore, has traditionally considered a variety of factors in determining whether a particular civil sanction is so punitive in purpose or effect as to require treatment as a criminal penalty. Although the Court has not developed an "exhaustive" or "conclusive" catalogue of the factors that are relevant in such an inquiry (*Ward*, 448 U.S. at 250), the considerations set forth in *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 168-169 (1963), have been found pertinent in making this analysis.[14] See *Ward*, 448 U.S. at 255-257 (Blackmun, J., concurring); *Bell* v. *Wolfish*, 441 U.S. 520, 539-540 (1979). A careful study of these factors demonstrates that 18 U.S.C.

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[14] Those factors include (372 U.S. at 168-169; footnotes omitted):

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned * * *.

924(d) should not be classified as a criminal penalty. Indeed, of the seven *Mendoza-Martinez* factors, only one—whether or not the proscribed conduct is already a crime—lends any support to the proposition that 18 U.S.C. 924(d) imposes a criminal penalty.

Forfeiture under 18 U.S.C. 924(d) does not impose an "affirmative disability or restraint" within the meaning of *Mendoza-Martinez*, 372 U.S. at 168. This first criterion for analyzing whether an act of Congress is civil or criminal in nature was drawn by the *Mendoza-Martinez* Court from *Flemming* v. *Nestor*, 363 U.S. 603, 617 (1960), where the Court concluded that the statutory termination of social security benefits because of past membership in the Communist Party did not involve an "affirmative disability or restraint" (*ibid.*). The reasoning in *Nestor* compels an analogous result in this case. Forfeiture, like the termination of social security benefits, does not approach the " 'infamous punishment' of imprisonment" (*Flemming* v. *Nestor*, *supra*, 363 U.S. at 317). Compare *Wong Wing* v. *United States*, 163 U.S. 228, 237 (1896) (imprisonment at hard labor). Furthermore, while it may involve hardship similar to that involved in *Nestor*, a proprietary forfeiture does not have the stigmatizing effect of a criminal conviction or result in a marked restriction of personal liberty.[15] Forfeiture

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[15] The declaration of a forfeiture under Section 924(d) does not render the prior possessor of the forfeited firearms a "criminal" or engender the disabilities commonly associated with a criminal conviction. A forfeiture order, for example, does not preclude a gun owner from possessing firearms in the future. Cf. 18 U.S.C. 922(h)(1) (persons convicted of "a crime punishable by imprisonment for a term exceeding one year" may not receive any firearm that has been shipped in interstate commerce).

under Section 924(d), therefore, does not evidence an unduly punitive intent on the part of Congress.[16]

The second factor noted by the Court in *Mendoza-Martinez*—whether a particular sanction "has historically been regarded as a punishment" (372 U.S. at 168)—plainly demonstrates the civil nature of Section 924(d). The forfeiture sanction provided by Section 924(d) is a "traditional[] * * * civil remedy." *Ward*, 448 U.S. at 256 (Blackmun, J., concurring). Proprietary forfeitures, unlike the historically punitive sanction of exile involved in *Mendoza-Martinez* (see 372 U.S. at 168 n.23) and the similarly criminal penalties at issue in the other cases cited by the *Mendoza-Martinez* Court on this point,[17] have histori-

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[16] In addition to *Flemming* v. *Nestor*, the *Mendoza-Martinez* Court cited two other cases to illustrate the phrase "affirmative disability or restraint." *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1866); *United States* v. *Lovett*, 328 U.S. 303 (1946). *Garland* involved an ex post facto enactment and *Lovett* a prohibited bill of attainder, both of which were designed to " 'punish [an] individual for past activity,' " rather than regulate " 'a present situation, such as the proper qualifications for a profession' " (*Flemming* v. *Nestor*, *supra*, 363 U.S. at 614, quoting *DeVeau* v. *Braisted*, 363 U.S. 144, 160 (1960)). The punitive intent of the legislature appears to have been the controlling factor in each case. *Flemming* v. *Nestor*, *supra*, 363 U.S. at 615-616. Cf. *Bell* v. *Wolfish*, *supra*, 441 U.S. at 539 n.20 (certain restrictions on the liberty of pretrial detainees "may on [their] face appear to be punishment," although they may in fact be incidents of a lawful nonpunitive governmental objective).

[17] *Wong Wing* v. *United States*, *supra*, 163 U.S. at 235, 237; (imprisonment at hard labor); *Ex parte Wilson*, 114 U.S. 417, 426-429 (1885) (same); *Mackin* v. *United States*, 117 U.S. 348, 350-351 (1886) (same); *Cummings* v. *Missouri*, 71 U.S. (4 Wall.) 277 (1866) (exclusion from a profession by means of a bill of attainder).

cally been classified as civil sanctions. As this Court stated in *Helvering*, 303 U.S. at 400 (citations omitted):

> Forfeiture of goods or their value and the payment of fixed or variable sums of money are * * * sanctions which have been recognized as enforcible by civil proceedings since the original revenue law of 1789. * * * In spite of their comparative severity, such sanctions have been upheld against the contention that they are essentially criminal and subject to the procedural rules governing criminal prosecutions.

In light of this history, it is unlikely that Congress thought it was utilizing a civil cloak to obscure a criminal penalty when it enacted 18 U.S.C. 924(d).

In contrast to most criminal penalties, forfeiture under Section 924(d) does not "come[] into play only on a finding of *scienter*" (*Mendoza-Martinez*, 372 U.S. at 168). Indeed, there is no scienter requirement at all for forfeitures under 18 U.S.C. 924(d). *United States* v. *16,175 Moslo Italian .22 Caliber Winlee Derringer Convertible Starter Guns, supra*, 443 F.2d at 466; *United States* v. *14 Handguns*, 524 F. Supp. 395, 398 (S.D. Tex. 1981); *United States* v. *57 Miscellaneous Firearms*, 422 F. Supp. 1066-1071 (W.D. Mo. 1976). Nor is the primary function of the statute to "promote the traditional aims of punishment—retribution and deterrence" (*Mendoza-Martinez*, 372 U.S. at 168). Although it may reasonably be anticipated that the prospect of a proprietary forfeiture will deter some individuals from violating federal gun control law, the deterrent or retributive aspects of a Section 924(d) forfeiture are no more pronounced than the unquestionably civil forfeitures at issue in *One*

Lot Emerald Cut Stones, supra, and *Various Items of Personal Property* v. *United States, supra.*[18]

In any event, and whatever the deterrent effect of Section 924(d), the statute plainly has an "alternative purpose" apart from the promotion of "the traditional aims of punishment" (*Mendoza-Martinez,* 372 U.S. at 168). Section 924(d) furthers the broad prophylactic goals of the Gun Control Act of 1968 by removing firearms from unregulated channels of commerce. See *United States* v. *16,179 Moslo Italian .22 Caliber Winlee Derringer Convertible Starter Guns, supra,* 443 F.2d at 466. And while the elimination of stocks of firearms that were intended for illegal distribution may result in some personal hardship for their prior owners, that fact alone is insufficient to render Section 924(d) penal in nature. As Justice Frankfurter stated in his concurring opinion in *United States* v. *Lovett,* 328 U.S. 303, 324 (1946): "The fact that harm is inflicted by governmental authority does not make it punishment. Figuratively speaking all discomforting action may be deemed punishment because it deprives of what otherwise would be enjoyed. But there may be reasons other than punitive for the deprivation." Section 924(d) is designed to make widespread, unregulated commerce in firearms impossible, and that purpose is unrelated to the pun-

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[18] The two cases cited in *Mendoza-Martinez* regarding retribution and deterrence (372 U.S. at 168) involved a monetary penalty far in excess of what could reasonably be related to any remedial purpose (*United States* v. *Constantine,* 296 U.S. 287 (1935)), and the loss of citizenship based upon a court martial conviction for deserting an Army post for less than one day (*Trop* v. *Dulles,* 356 U.S. 86 (1958)). In contrast to these cases, Section 924(d) does not impose a sanction entirely disproportionate to the misconduct triggering the penalty.

ishment of any individual gun dealer, collector, or purchaser.

Forfeiture, finally, is not "excessive" in relation to the remedial purpose of Section 924(d) (*Mendoza-Martinez*, 372 U.S. at 169). In fact, the sanction in this case could hardly be any more closely tied to the remedial goal of Section 924(d): removal of firearms from illicit circulation.

Although the factors delineated in *Mendoza-Martinez* "may often point in different directions" (372 U.S. at 169), the above considerations indicate a single conclusion: 18 U.S.C. 924(d) is civil rather than penal in nature. The sole *Mendoza-Martinez* factor that lends any support to the court of appeals' conclusion that 18 U.S.C. 924(d) is "criminal in nature" (Pet. App. 9a) is that much of "the behavior to which it applies is already a crime" (*Mendoza-Martinez*, 372 U.S. at 168). This Court, however, has previously found that this factor is not of controlling significance. *Ward*, 448 U.S. at 250.

The fact that civilly penalized conduct may also be a crime "seems to point toward a finding that [a particular sanction] is criminal in nature." *Ward*, 448 U.S. at 250. But, because "Congress may impose both a criminal and a civil sanction in respect to the same act or omission" (*Helvering*, 303 U.S. at 399), "that indication is not as strong as it seems at first blush" (*Ward*, 448 U.S. at 250). See *One Lot Emerald Cut Stones*, 409 U.S. at 235. Indeed, Congress regularly imposes parallel civil and criminal penalties on specified activities precisely to afford a broad range of governmental responses to prohibited conduct. See, *e.g.*, 18 U.S.C. 1964 (setting forth civil remedies in addition to criminal penalties for violation of RICO); 18 U.S.C. 287 and 31 U.S.C. 231 (criminal and civil penalties for presenting "false, fictitious, or fraudu-

lent" claims against the government); 29 U.S.C. 666 (criminal and civil penalties for violation of the Occupational Safety and Health Act of 1970); 42 U.S.C. (& Supp. IV) 5410 (criminal and civil penalties for violation of Mobile Home Construction and Safety Standards Act of 1974); 30 U.S.C. (Supp. V) 820 (criminal and civil penalties for violation of coal mine health and safety standards); 30 U.S.C. (Supp. V) 1268 (criminal and civil penalties for violating any permit issued under the Surface Mining Control and Reclamation Act of 1970); 16 U.S.C. (& Supp. V) 1540 (criminal and civil penalties for violation of the Endangered Species Act of 1973). In some contexts, the civil penalties may even prove as effective as the criminal ones in deterring future misconduct. See, *e.g.*, 15 U.S.C. 15 (treble damage provision of the Clayton Act). Therefore, in analyzing the possible penal nature of a nominally civil sanction, whether or not particular conduct is already a crime gains importance only where there is some substantial additional basis for concluding that Congress specifically intended the civil sanction in question to be additional punishment for engaging in the proscribed conduct.[19]

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[19] See, *e.g.*, *United States* v. *LaFranca*, *supra*, 282 U.S. at 572-573 ("the exaction here in question is not a true tax, but a penalty involving the idea of punishment for infraction of the law"); *United States* v. *Constantine*, *supra*, 296 U.S. at 295 ("Where, in addition to the normal and ordinary tax fixed by law, an additional sum is to be collected by reason of conduct of the taxpayer violative of the law, and this additional sum is grossly disproportionate to the amount of the normal tax, the conclusion must be that the purpose is to impose a penalty as a deterrent and punishment of unlawful conduct"). To what extent those cases survive *Helvering* is uncertain, but their continuing vitality is surely limited to rather egregious circumstances.

There is no basis in this case for concluding that Congress intended Section 924(d) to operate as a penal sanction. As noted earlier (page 26, *supra*), Congress purposefully drafted Section 924(d) to reach a broader range of conduct than is proscribed by the criminal provisions of the 1968 Gun Control Act. Because the sanction embodied in Section 924(d) is not limited to criminal misconduct (*United States* v. *One Assortment of Seven Firearms*, *supra*, 632 F.2d at 1278), there is no reason to assume that Congress "intend[ed] forfeiture[] to be [a criminal] penalty" (Pet. App. 14a, Winter, C.J., dissenting). Congress did not enact Section 924(d) primarily to "impose a penalty as a deterrent and punishment for unlawful conduct" (*United States* v. *Constantine*, *supra*, 296 U.S. at 295), and the fact that the section may apply to some conduct that *is* a crime "does not mandate characterization of [this] proceeding as 'criminal'" (*Ward*, 448 U.S. at 257 (Blackmun, J., concurring)). To the contrary, inasmuch as the "other [*Mendoza-Martinez*] factors weigh in the opposite direction" (*ibid.*), the civil, remedial nature of 18 U.S.C. 924(d) is readily apparent.

III. THE FACT THAT FORFEITURE PROCEEDINGS ARE "QUASI-CRIMINAL" FOR SOME CONSTITUTIONAL PURPOSES DOES NOT COMPEL PRECLUSION OF THE PRESENT ACTION

Forfeiture proceedings have in some contexts been labelled "quasi-criminal" because their object is to penalize through civil processes the commission of offenses against the law. See *One 1958 Plymouth Sedan* v. *Pennsylvania*, 380 U.S. 693, 700 (1965), citing *Boyd* v. *United States*, 116 U.S. 616, 633-634 (1886). In *Boyd* the Court went so far as to state (116 U.S. at 634) that forfeitures, "though they may be civil in

form, are in their nature criminal." The court of appeals, relying on this dictum, concluded that forfeiture under 18 U.S.C. 924(d) is "criminal in nature and the prior jury verdict is a bar to the present proceeding" (Pet. App. 9a). The decision in *Boyd*, however, simply will not support such a broad conclusion, as is clear from the analysis in *Ward*. See 448 U.S. at 251-255.

In *Boyd*, the petitioners had been indicted for fraudulently attempting to deprive the United States of certain customs duties on imported merchandise, under a statute that called for forfeiture of the imported property as well as a fine and imprisonment. 116 U.S. at 617. While the criminal indictment was pending, petitioners filed a claim for the goods held by the United States. The prosecution, in response, obtained a district court order requiring petitioners to produce the invoice covering the goods in question. Petitioners objected to this order on the ground that it subjected them to an unreasonable search and seizure and violated their Fifth Amendment self-incrimination rights. This Court, in ruling on those contentions, concluded that civil suits for "penalties and forfeitures" are "quasi-criminal" in nature and are therefore "within the reason of criminal proceedings for all the purposes of the Fourth Amendment of the Constitution, and of that portion of the Fifth Amendment which declares that no person shall be compelled in any criminal case to be a witness against himself * * *" (116 U.S. at 634).

This Court has subsequently enforced the above precise holding of *Boyd*. See, *e.g.*, *Lees* v. *United States*, 150 U.S. 476 (1893) (monetary penalty proceeding is sufficiently criminal to trigger the self-incrimination clause of the Fifth Amendment); *One*

1958 Plymouth Sedan v. *Pennsylvania*, *supra* (Fourth Amendment exclusionary rule applies to state proceeding for the forfeiture of an automobile allegedly involved in the illegal transportation of liquor); *United States* v. *United States Coin & Currency*, 401 U.S. 715 (1971) (self-incrimination clause of the Fifth Amendment applies to a proceeding by the United States to secure forfeiture of money found in the possession of a gambler at the time of his arrest).[20] "This Court has declined, however, to give full scope to the reasoning and dicta in *Boyd*, noting on at least one occasion that '[s]everal of *Boyd*'s express or implicit declarations have not stood the test of time.'" *Ward*, 448 U.S. at 253, quoting *Fisher* v. *United States*, 425 U.S. 391, 407 (1976). One such assertion in *Boyd* that has never been accorded its "full scope" (*ibid.*) is the statement that forfeitures "are in their nature criminal" (116 U.S. at 634).

Read literally, the dictum in *Boyd* relied upon by the court of appeals (Pet. App. 9a) would require the wholesale application of criminal procedural and constitutional law to in rem forfeiture actions. But the subsequent decisions of this Court have stopped far short of such a result. "In determining whether particular rules of criminal procedure are applicable to civil actions to enforce sanctions, the cases have

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[20] While *Boyd*'s extension of Fourth Amendment search and seizure and Fifth Amendment self-incrimination rights to "penalty and forfeiture" actions remains more or less intact, the substantive content of those rights has been altered dramatically since 1886. Indeed, so far as *Boyd*'s Fourth and Fifth Amendment analysis is concerned, "[i]t would appear that * * * the precise claim sustained in *Boyd* would now be rejected for reasons not there considered." *Fisher* v. *United States*, 425 U.S. 391, 408 (1976), citing *Bellis* v. *United States*, 417 U.S. 85 (1974).

usually attempted to distinguish between the type of procedural rule involved rather than the kind of sanction being enforced." *Helvering*, 303 U.S. at 400 n.3. Thus, in *United States* v. *Regan*, 232 U.S. 37 (1914), the Court declined to hold that the government must prove its case beyond a reasonable doubt in order to collect a civil monetary penalty—even though the Court had previously held that a similar statute triggered the Fifth Amendment's self-incrimination clause. *Lees* v. *United States*, *supra*. "*Boyd* and *Lees*, according to *Regan*, were limited in scope to the Fifth Amendment's guarantee against compulsory self-incrimination, which 'is of broader scope than are the guarantees in Art. III and the Sixth Amendment governing trials and criminal prosecutions.'" *Ward*, 448 U.S. at 253, quoting *United States* v. *Regan*, *supra*, 232 U.S. at 50. Similarly, in *Hepner* v. *United States*, 213 U.S. 103 (1909), the Court upheld the entry of a directed verdict in favor of the United States under the predecessor to the statute involved in *Regan*. According to *Hepner* (213 U.S. at 112), "the *Lees* and *Boyd* cases do not modify or disturb but recognize the general rule that penalties may be recovered by civil actions, although such actions may be so far criminal in their nature that the defendant cannot be compelled to testify against himself in such actions in respect to any matters involving, or that may involve, his being guilty of a criminal offense." Recent decisions of this Court, of course, similarly recognize the essentially civil nature of in rem forfeiture actions. *One Lot Emerald Cut Stones*, 409 U.S. at 232; *Helvering*, 303 U.S. at 400.

Boyd and its progeny may be taken to establish that the Fourth Amendment's protections against unreasonable searches and seizures and the Fifth Amendment's self-incrimination privilege have some

application to certain penalty and forfeiture actions. These cases do not, however, require across-the-board application of criminal procedural and constitutional rights to any case that can be loosely labelled "quasi-criminal." [21] The only issue raised by *Boyd* in this case, therefore, is whether forfeiture under 18 U.S.C. 924(d) is "so far criminal in [its] nature" (*Ward*, 448 U.S. at 253) as to trigger the double jeopardy clause of the Fifth Amendment.[22] The short answer to this question is that this Court has already determined that "[t]he provision of the Fifth Amendment to the Constitution in respect of double jeopardy does not apply" to in rem forfeiture actions (*Various Items of Personal Property* v. *United States*, *supra*,

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[21] A probation revocation proceeding, for example, is almost certainly "quasi-criminal," yet the federal courts have held that, notwithstanding possible Fourth Amendment concerns, the exclusionary rule is not applicable to probation revocation proceedings. See, *e.g.*, *United States* v. *Frederickson*, 581 F.2d 711, 713 (8th Cir. 1978) (per curiam); *United States* v. *Winsett*, 518 F.2d 51, 53-55 (9th Cir. 1975); *United States* v. *Farmer*, 512 F.2d 160, 162-163 (6th Cir.), cert. denied, 423 U.S. 987 (1975); *United States* v. *Brown*, 488 F.2d 94, 95 (5th Cir. 1973) (per curiam); *United States* v. *Hill*, 447 F.2d 817, 819 (7th Cir. 1971); *United States ex rel. Sperling* v. *Fitzpatrick*, 426 F.2d 1161, 1163 (2d Cir. 1970) (parole revocation). See also *Ballard* v. *State*, 595 P.2d 1302 (Utah 1979) (acquittal of motorist charged with driving under the influence of alcohol is not a bar to administrative revocation of the motorist's driver's license).

[22] Double jeopardy is the only constitutional doctrine that could conceivably bar a civil forfeiture action following a criminal acquittal, because the government has never been required to meet the reasonable doubt standard in a civil penalty action [see *United States* v *Regan*, *supra*] and "the difference in the burden of proof in criminal and civil cases [therefore] precludes application of the doctrine of collateral estoppel." *One Lot Emerald Cut Stones*, 409 U.S. at 232.

282 U.S. at 581) because "Congress may impose both a criminal and a civil sanction in respect to the same act or omission" (*Helvering*, 303 U.S. at 399). As developed above, 18 U.S.C. 924(d) provides a civil, remedial sanction, and nothing in *Boyd* or the cases applying *Boyd* suggests that a prior criminal acquittal on gun control charges precludes the government from enforcing the civil forfeiture at issue here.

The decision of the court of appeals is somewhat obscure, in that it is not entirely clear whether the court believes the forfeiture action in this case is barred by res judicata, double jeopardy, collateral estoppel, or some generalized rule of preclusion emanating from *Coffey* v. *United States*, *supra*. Whatever the foundation for the decision, however, it is pellucidly clear that a criminal acquittal does not, on any of the above grounds, pretermit a subsequent civil, remedial action. *One Lot Emerald Cut Stones*, 409 U.S. at 235-237; *Helvering*, 303 U.S. at 397-405; *Murphy* v. *United States*, *supra*, 272 U.S. at 631-632; *Stone* v. *United States*, *supra*, 167 U.S. at 186-187. Congress enacted Section 924(d) for the remedial purpose of eliminating dangerous weapons from unregulated channels of commerce, and it provided civil procedures for enforcement of the section. Forfeiture, moreover, is not an unduly punitive sanction; indeed, Section 924(d) does not impose a disability any more harsh than the forfeiture at issue in *One Lot Emerald Cut Stones* or the stiff monetary penalty involved in *Helvering*. In these circumstances, the court of appeals plainly erred in concluding that a gun owner's prior acquittal on criminal firearms charges bars a subsequent civil in rem action against the firearms.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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No. 82-1047

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA,
Petitioner

v.

ONE ASSORTMENT OF 89 FIREARMS,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR THE RESPONDENT

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BRIEF FOR THE RESPONDENT

STATUTES INVOLVED

18 USC § 922. Unlawful Acts

(a) It shall be unlawful—

(1) For any person, except a licensed importer, licensed manufacturer, or licensed dealer, to engage in the business of importing, manufacturing, or dealing in firearms or ammunition, or in the course of such business to ship, transport, or receive any firearm or ammunition in interstate or foreign commerce;

18 USC § 923. Licensing

(a) No person shall engage in business as a firearms or ammunition importer, manufacturer, or dealer until he has filed an application with, and received a license to do so from, the Secretary.

18 USC § 924. Penalties

(a) Whoever violates any provision of this chapter or knowingly makes any false statement or representation with respect to the information required by the provisions of this chapter to be kept in the records of a person licensed under this chapter, or in applying for any license or exemption or relief from disability under the provisions of this chapter, shall be fined not more than $5,000, or imprisoned not more than five years, or both, and shall become eligible for parole as the Board of Parole shall determine.

(d) Any firearm or ammunition involved in or used or intended to be used in, any violation of the provisions of this chapter or any rule or regulation promulgated thereunder, or any violation of any other criminal law of the United States, shall be subject to seizure and forfeiture and all provisions of the Internal Revenue Code of 1954 relating to the seizure, forfeiture, and disposition of firearms, as defined in section 5845(a) of that Code, shall, so far as applicable, extend to seizures and forfeitures under the provisions of this chapter.

STATEMENT OF THE CASE

Patrick M. Mulcahey, at his home in Columbia, South Carolina, sold, to undercover agents of the Bureau of Alcohol, Tobacco and Firearms (BATF), a Ruger .357 Magnum pistol on May 13, 1976, a Taurus .38 caliber pistol on May 19, 1976, and a Smith and Wesson 9mm automatic on May 26, 1976. During 1976, Mulcahey purchased a Smith and Wesson .357 revolver, a Smith and Wesson .38 caliber revolver, and a total of seven (7) Ruger .223 caliber rifles. On December 31, 1976, Mulcahey purchased a Smith and Wesson 9mm pistol (Pet. App. 33A-35A).

On January 20, 1977, Special Agents of the BATF executed a search warrant on Mulcahey's residence and seized one hundred and five (105) firearms. (Pet. App. 36A).

Mulcahey was indicted and tried for a single violation of 18 USC § 922(a)(1) and § 924(a). Mulcahey was acquitted following the criminal trial (*United States v. Mulcahey*, 77-0013, March 16, 1977) (Pet. App. 2A).

The forfeiture action against the firearms seized from Mulcahey was initiated by the Government on March 31, 1977 by service of a complaint seeking forfeiture pursuant to 18 USC § 922(a)(1) and § 924(d). (Pet. App. 2A).[1] Mulcahey filed a claim for recovery of the firearms and an Answer to the Complaint, raising as defenses collateral estoppel and *res judicata* based upon the verdict of acquittal in the previous criminal trial. The forfeiture action was submitted to the District Court upon a stipulation that the transcript of the criminal trial would be considered by the Court in lieu of testimony (Pet. App. 2A). The stipulation was entered into because Mulcahey and the Government agreed that the facts in the criminal trial were the same facts as those which would have been elicited at a subsequent civil forfeiture proceeding. The District Court ordered a forfeiture of eighty (80) of the firearms, an order which a panel of the Fourth Circuit reversed, relying on *Coffey v. United States*, 116 U.S. 436 (1886). The Government was granted a rehearing *en banc*, after which the Fourth Circuit affirmed the panel decision in favor of Mulcahey (Pet. App. 2A-3A).

Judge Chapman, writing for the majority in the Fourth Circuit, held that in the criminal proceeding against Mulcahey, the elements of the forfeiture were all resolved against the Government, and that therefore the forfeiture action was barred by collateral estoppel (Pet. App. 6A). The majority opinion stated that

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[1] § 923(a), a provision of the licensing section of the Gun Control Act, was also given as the basis for the forfeiture. It was, however, unnecessary to include this section since the unlawful act in which the firearms allegedly were intended to be used was found in § 922(a)(1).

> [f]irearms are not contraband and are not subject to seizure unless they are used or intended to be used in violation of the Gun Control Act. This issue of whether the firearms were used or intended to be used in violation of the act was tried in No. 77-00013 and conclusively decided. The government now wishes to re-litigate the same issue, hoping for a different result

The majority opinion further stated:

> To support a conviction under 18 USC § 922(a), the government must prove two essential elements: First, that the defendant, between the dates specified in the indictment, engaged in the business of dealing in firearms (or ammunition); and second, that at the time he engaged in that business he was not a licensed importer, licensed manufacturer, or licensed dealer in firearms. 2 Devitt and Blackmar, *Federal Jury Practice and Instruction*, § 59.10. The same two essential elements must be proved in the forfeiture action. The United States had its day in court on these identical issues in the criminal case and is collaterally estopped by the verdict in that case from pursuing the matter in this forfeiture action. (Pet. App. 7A).

Finally, the majority opinion in the Fourth Circuit noted that:

> The forfeiture provision set forth in § 924(d) is a part of the "Penalties" section of the law. Everything in § 924 provides a penalty, be it a fine, prison or forfeiture, for the violation of a provision of the Gun Control Act. The forfeiture provision is merely a way of disposing of firearms which have been used in violation of the Act, after there is a conviction of such violation. Forfeiture is a penalty suffered by a defendant in addition to a fine and/or imprisonment. If Mulcahey had been convicted, he could have been fined and/or imprisoned and could have lost all of his firearms under § 924(d). But he was acquitted on the charge of being a gun dealer without a license. However, the government still wishes to

invoke the penalty of § 924(d). Mulcahey would thereby be subject to the same penalty of losing his property for an activity for which he had been found not guilty. (Pet. App. 9A-10A).

The factual allegations, charging the offense of "dealing in firearms without a license", are identical in the criminal indictment and the Complaint for Forfeiture. The Government lost in the criminal trial, and now seeks to assert a penalty against Mulcahey under 18 USC § 924(d).

SUMMARY OF ARGUMENT

In *Coffey v. United States*, 116 U.S. 436 (1886), this Court held that where a criminal proceeding which resulted in an acquittal is followed by a civil forfeiture action based upon the same facts as the criminal proceeding and in which the elements to be proven are identical to those required to be proven in the criminal proceeding, the civil forfeiture action is precluded. In subsequent cases, some involving civil actions subsequent to convictions, some involving civil actions in which the elements were different than those in the prior criminal proceeding, and some involving civil actions for monetary sanctions or damages subsequent to acquittals, this Court has never overruled or limited the narrow preclusion doctrine of *Coffey*. Thus, *Coffey*, to the extent it applies to situations on all fours with *Coffey*, remains good law and precludes the forfeiture action in the instant case.

If this Court should conclude that *Coffey* has been overruled and that civil forfeiture actions subsequent to acquittals are barred only if the forfeiture at issue is shown to be punitive, it is plain that the forfeiture in the instant case is barred since § 924(d) was intended to be, and is, punitive. This conclusion is drawn from the fact that § 924(d) is in the "Penalties" section of the Gun Control Act and additionally, by applying to the forfeiture in the instant case, the seven factors set forth in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963).

ARGUMENT

I. THE DECISION IN *COFFEY V. UNITED STATES* IS STILL GOOD LAW AND COMPELS PRECLUSION OF A CIVIL FORFEITURE ACTION FOLLOWING A CRIMINAL ACQUITTAL, WHERE THE CIVIL FORFEITURE ACTION IS BASED UPON THE SAME ACTS AND REQUIRES PROOF OF THE SAME ELEMENTS AS THE CRIMINAL PROCEEDING.

As the Government correctly observes, the decision of the *en banc* court below rests squarely upon a single aged precedent—*Coffey v. United States*, 116 U.S. 436 (1886), a case virtually identical to the case at bar. Careful analysis of this Court's decisions since *Coffey* reveals, however, that while *Coffey* may be aged, the preclusion doctrine established therein has not lost its vitality. Indeed, this Court's decisions of the last 97 years consistently demonstrate that the fairly narrow preclusion doctrine announced in *Coffey*, while it has been distinguished, has never been questioned.[2]

The heart of this Court's holding in *Coffey* is found in the statement that

> where an issue raised as to the existence of the act or fact denounced has been tried in a criminal proceeding, instituted by the United States, and a judgment of acquittal has been rendered in favor of a particular person, that judgment is conclusive in favor of such person, on the subsequent trial of a suit *in rem* by the United States, where, as against

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[2] In its attempt to demonstrate that the doctrine announced in *Coffey* has been whittled away to the degree that it is virtually nonexistent, the Government takes the position that *Coffey* announced a "broad preclusion doctrine". In fact, the doctrine announced in *Coffey* was fairly narrow and it is upon that narrow doctrine that Respondent relies.

> him, the existence of the same act or fact is the matter in issue, as a cause for the forfeiture of the property prosecuted in such suit *in rem*. 116 U.S. at 443.

The essence of this holding is that where a criminal proceeding which resulted in an *acquittal* is followed by a civil forfeiture action which is based upon the same facts as the criminal proceeding *and* in which the elements to be proven are identical to those required to be proven in the criminal proceeding, the civil forfeiture action is precluded.

Unfortunately, this Court did not explicate the legal foundation for its decision in *Coffey* in that it did not expressly state that the forfeiture action was barred by either *res judicata*, collateral estoppel, or Double Jeopardy. A close reading of *Coffey* reveals, however, that the decision was based upon notions of collateral estoppel,[8] not

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[8] It is important to distinguish collateral estoppel and *res judicata*. As this Court has observed, "under the doctrine of *res judicata* a judgment entered in an action conclusively settles *that action* as to all matters that were or might have been litigated or adjudged therein. But a prior judgment between the parties has been held to operate as an estoppel in a suit *on a cause of action different from that forming the basis for the original suit* 'only as to these matters in issue or points controverted, upon the determination of which the finding or verdict was rendered.'" (emphasis added) *Partman Corp. v. Paramount Corp.*, 347 U.S. 89, 90-91 (1954). In forfeiture actions against property allegedly used in connection with a criminal violation, while the defendant may formally be the property, the real party in interest is the claimant, a fact acknowledged in *Coffey* (116 U.S. at 444) and implicitly recognized by this Court in subsequent cases. See, e.g. *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693 (1965) (Exclusionary Rule, arising from Fourth Amendment right of "the people" to be secure against unreasonable searches and seizures, applied to civil forfeiture) and *United States v. U.S. Coin and Currency*, 401 U.S. 715 (1971) (Fifth Amendment right of "any person" not to be compelled to incriminate himself applied to civil forfeiture). Thus, the parties in a civil forfeiture action are the same as the parties in a criminal proceeding.

upon Double Jeopardy or *res judicata*, since this Court empasized that "the facts which were the basis" of the criminal proceeding "did not exist" and therefore "cannot be again litigated". 116 U.S. at 444.[4] It is for this reason that subsequent decisions of this Court have not impaired the vitality of the preclusion doctrine of *Coffey*.

To better understand this Court's decision in *Coffey*, it is useful to understand what *Coffey* does not hold. In the first place, the rationale of *Coffey* would not preclude any type of civil action, including a forfeiture, brought subsequent to a criminal proceeding which had resulted in a *conviction* since, in that instance, "the facts which were the basis" of the criminal proceeding *would* have been found to exist.[5] In addition, *Coffey* would not preclude any type of subsequent civil action where the criminal offense included an element or elements which did not have to be proven in the civil action since plainly "the facts which were the basis" of the crimianl proceeding would have been different than those which were the basis of the civil proceeding. Thus, only a narrow class of subsequent civil actions are barred by *Coffey*.

Coffey, of course, involved a forfeiture action against items of property which were connected to a criminal

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[4] Further evidence that this Court's decision in *Coffey* was predicated upon collateral estoppel is the citation of *Gelston v. Hoyt*, 3 Wheat. (16 U.S.) 246 (1818), in which it was held that a verdict against the United States in a prior forfeiture action eliminated the defense of justification in a suit in trespass by the owner of the seized property against the persons who seized it.

[5] Thus, as the court below held, *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943) (civil action for restitution subsequent to conviction) and *Rex Trailer Co. v. United States*, 350 U.S. 148 (1955) (civil action for damages subsequent to conviction) are inapplicable to this case. In addition, *Coffey* would not bar criminal forfeitures brought pursuant to the Organized Crime Control Act, 18 USC § 1963, or the Comprehensive Drug Prevention and Control Act, 21 USC § 848(a)(2).

offense allegedly committed by the claimant. It is to that type of civil action that this Court has, to date, limited *Coffey* and to which it should continue to limit *Coffey*. Thus, *Coffey* cannot, and should not, be read as the Government suggests, i.e. "as precluding only the imposition of criminal punishments following a criminal acquittal" (Br. for U.S. 13), particularly since the plain language of the decision does not suggest such a reading nor do subsequent decisions of this Court.[6]

This Court's first opportunity to review its decision in *Coffey* was in *Stone v. United States*, 167 U.S. 178 (1897), where, following an acquittal of Stone on charges of unlawfully, willfully, and feloniously cutting and removing timber from lands of the United States, the Government instituted a civil action against him to recover the value of the timber allegedly removed and converted. Holding that the subsequent civil action was not barred by *Coffey*, this Court explained that "there was [in *Coffey*] no claim of the United States to property" (167 U.S. at 186) as there was in *Stone* and that the civil action in *Stone*, as had been the case in *Coffey*, was not a suit to declare a forfeiture. Instead, the issue in *Stone* was wholly as to the ownership of property . . . [the Government seeking in its capacity *as owner or property, illegally converted*, to recover its value." (emphasis added) 167 U.S. at 188. Moreover, the civil action in *Stone*, unlike the previous criminal action, clearly could

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[6] Indeed, if *Coffey* is read as the Government suggests, it would appear that there is no distinction between it and the line of cases cited in *Ashe v. Swenson*, 397 U.S. 436, 443-445 (1970) which hold that the Double Jeopardy Clause of the Fifth Amendment bars reprosecution of a person if, in a prior criminal proceeding, he had been acquitted of committing the same act. Yet, as *Ashe v. Swenson* clearly established a new interpretation of the law regarding collateral estoppel, it is apparent that it is not merely restating *Coffey*. Thus, *Coffey* must stand for a different principle than the Government suggests.

be maintained without a showing that the defendant had willfully or feloniously obtained the property, thereby further distinguishing *Stone* from *Coffey*. As with *Stone*, *Murphy v. United States*, 272 U.S. 630 (1926) (injunction to abate nuisance may be maintained subsequent to acquittal as injunction not based upon commission of crime); *United States ex rel Marcus v. Hess*, 317 U.S. 537 (1943) (civil action for restitution subsequent to conviction); and *Rex Trailer Co., Inc. v. United States*, 350 U.S. 148 (1955) (civil action for damages subsequent to conviction) are each easily distinguishable from *Coffey*.

The decision of this Court upon which the Government places greatest reliance to support its argument that the doctrine announced in *Coffey* has been abrogated is *Helvring v. Mitchell*, 303 U.S. 391 (1938). Unlike *Coffey*, however, *Helvring* involved the imposition of an additional tax for failure to pay income taxes (not a forfeiture of property allegedly connected to a criminal offense) following acquittal of the taxpayer on charges of fraudulently and willfully evading the income tax. For these reasons, *Helvring* is plainly distinguishable from *Coffey*.

In concluding that the additional tax, which was "provided primarily as a safeguard for protection of the revenue and to reimburse the Government for the heavy expense of investigation and loss resulting from the taxpayer's fraud" (303 U.S. at 401), was not barred, this Court considered three arguments advanced by the defendant: *res judicata*, the Double Jeopardy Clause, and *Coffey*.[7] While it rejected all three arguments, it did not

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[7] To justify its conclusion that this Court "quickly dispatched" the "collateral estoppel argument", the Government states that *res judicata* was "apparently used in a broad sense as including collateral estoppel, see 303 U.S. at 397". Br. for U.S. 14. This interpretation of *Helvring* is, however, without foundation in that this

in doing so "simply reverse[] the position taken in *Coffey*". Br. for U.S. 14. Rather, this Court correctly concluded that because *Helvring* imposed "a civil administrative sanction" (303 U.S. at 406), not a forfeiture, *Coffey* was not "an obstacle to the recovery" of the additional tax. Indeed, rather than disapprove *Coffey*, as expressly requested by the Government (303 U.S. at 405), this Court distinguished *Coffey* on the grounds that *Helvring* involved a "civil administrative sanction", not a penalty and most certainly not a forfeiture.[8] With respect to the *res judicata* argument, this Court also correctly held that because there is a "difference in the de-

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Court also refers to the doctrine of *res judicata* as the doctrine of "estoppel by judgment" (303 U.S. at 397), a doctrine clearly distinguishable from "estoppel by verdict" or collateral estoppel. See 50 C.J.S. § 593(b).

[8] This Court also did not conclude, as the Government states, that "'[f]orfeiture of goods or their value or (sic) the payment of fixed or variable sums of money' *are* civil sanctions *because* they have historically been 'enforcible by civil proceedings'". (emphasis added) Br. for U.S. 15-16. Rather, this Court only concluded that forfeitures and civil penalties are enforcible by civil proceedings without expressing any view as to whether such sanctions are civil or criminal. Nonetheless, this Court has held some of the protections afforded by the Bill of Rights are applied in civil forfeiture actions. See *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693 (1965) (Fourth Amendment exclusionary rule) and *United States v. U.S. Coin and Currency*, 401 U.S. 715 (1971) (Fifth Amendment guarantee against compulsory self-incrimination). Cf. *Various Items of Personal Property v. United States*, 282 U.S. 577 (1931) (Double Jeopardy Clause does not apply to forfeiture) and *United States v. Zucker*, 161 U.S. 475 (1896) (Sixth Amendment right to confront witnesses does not apply in forfeiture action). The apparent disparity in these cases can be reconciled if it is observed that the Fourth Amendment imposes restrictions on government activity without regard to the type of action in which seized property will be used and that the Self-Incrimination Clause applies to "any criminal case", but that the Double Jeopardy Clause only prohibits double jeopardy where the person is in jeopardy of "life or limb" and the Sixth Amendment only applies to "criminal prosecutions".

gree of the burden of proof in criminal and civil cases . . . application of the doctrine of *res judicata* . . ." was precluded. 303 U.S. at 391.

The Court's most recent pronouncement in the area of forfeitures is its decision in *One Lot Emerald Cut Stones and One Ring v. United States*, 409 U.S. 234 (1972), which involved the forfeiture of property not declared to customs authorities subsequent to an acquittal on charges of "willfully and knowingly, with intent to defraud the United States, smuggling [one lot of emerald cut stones and one ring] into the United States without submitting to the required customs procedure." 409 U.S. at 232-233.[9] This Court went to great lengths to make clear that the forfeiture *did not result*, as had been the case in *Coffey* and is the situation in the instant case, "by reason of the commission of a criminal offense." 409 U.S. at 236, n.6 In a prior footnote, this Court also distinguished *Coffey* (notably, without indicating that Coffey was, in any way, disapproved) when it noted the "difference in the issues involved in the criminal proceeding, on the one hand, and the forfeiture action on the other" (409 U.S. at 232, n.5), i.e. the added element of intent that had to be shown in the criminal proceeding. Most importantly,

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[9] This Court's decision in *United States v. $8,850*, No. 81-1062, (May 23, 1983) is plainly irrelevant to the issue in the instant case since the issue therein was "whether the Government's 18-month delay in filing a civil proceeding for forfeiture . . . violates the claimant's right to due process of law." Slip op. 1. Moreover, since the elements of the misdemeanor offense of which the claimant was acquitted were different (an element of willfullness was included in the misdemeanor offense) than the elements of the civil forfeiture action, the claimant could not have raised *Coffey* as a bar to the civil forfeiture action. Likewise, this Court's decision in *United States v. Ward*, 448 U.S. 242 (1980) does not limit the holding in *Coffey* since *Ward* clearly concerned not a forfeiture but rather a monetary civil penalty in the nature of damages. More to the point, the civil action in *Ward* was not instituted subsequent to an acquittal in a criminal proceeding; thus, neither *res judicata*, collateral estoppel, nor Double Jeopardy were at issue in *Ward*.

however, this Court expressly upheld *Coffey* by commencing its opinion in *One Lot* with the statement that "[c]ollateral estoppel *would bar* a forfeiture under §1497 [which was not the basis of the prior criminal proceeding] *if, in the earlier criminal proceeding, the elements of a § 1497 forfeiture had been resolved against the Government.*" (emphasis added) 409 U.S. at 234. In so doing, this Court made plain, as it had in *Coffey* nearly a century earlier,[10] that the differing standards of proof, while they might preclude application of the doctrine of *res judicata*, could not be used to preclude application of the doctrine of collateral estoppel. Thus, this Court's most recent review of *Coffey* makes clear that *Coffey*, to the degree it is limited to civil forfeiture actions subsequent to criminal acquittals where the facts and issues in both proceedings are identical, remains good law. As a consequence, the civil forfeiture action in the instant case should, under the *Coffey* doctrine, have been precluded.

II. FORFEITURE UNDER 18 U.S.C. 924(d) IS PUNITIVE.

Should this Court decide to overrule the well-established narrow preclusion doctrine of *Coffey* which, just a decade ago, it approved, and determine, as did the original dissent in the court below, that preclusion is demanded only where a subsequent forfeiture proceeding is deemed to be criminal in nature, this Court should then conclude, as did the majority in the court below, that 18 U.S.C. 924 (d) is punitive in nature.[11] As a consequence, the for-

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[10] "It is urged as a reason for not allowing such effect to the judgment, that the acquittal in the criminal case may have taken place because of the rule of requiring guilt to be proved beyond a reasonable doubt, and that, on the same evidence, on the question of preponderance of proof, there might be a verdict for the United States in the suit *in rem*. Nevertheless, the fact or act has been put in issue and determined against the United States . . ." 116 U.S. at 443.

[11] The original dissent in the court below concluded that *Coffey* bars only a "subsequent criminal forfeiture . . . arising out of the

feiture action is barred by the Double Jeopardy Clause of the Fifth Amendment.

Over the years, this Court has had to determine whether certain civil sanctions were sufficiently punitive in nature to require application of the guarantees of the Bill of Rights (see cases cited in fn. 7) to certain civil actions and has found the problem to be extremely difficult and elusive of solution. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168. As to forfeitures, however, this Court has held that "they are within the reason of criminal proceedings for all purposes of the fourth amendment of the constitution, and of that portion of the fifth amendment which declares that no person shall be compelled in any criminal case to be a witness against himself . . . ." *Boyd v. United States*, 116 U.S. 616, 634 (1886). Subsequent cases, such as *United States v. Regan*, 232 U.S. 37 (1914) (Government need not prove case beyond reasonable doubt in action for $1,000 penalty) and *United States v. Ward*, 448 U.S. 242 (1980), have made clear that the rule of *Boyd* applies primarily to forfeitures, not to monetary penalties. Cf. *Lees v. United States*, 150 U.S. 476 (1893). Indeed, as to forfeitures, this Court has not hesitated to apply the guarantees of the Bill of Rights when the forfeiture is "part of the punishment for the criminal offense." *Various Items of Personal Property v. United States*, 282 U.S. 568, 581 (1931). Thus, it must be determined whether § 924(d) is "part of the punishment for the criminal offense."

In the absence of conclusive evidence of congressional intent (which is, nonetheless, plain in the instant case,

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same facts" as an earlier criminal acquittal (Pet. App. 23a). Since, however, none of this Court's decisions have used the term "criminal forfeiture" in the context of a forfeiture action subsequent to a criminal acquittal, it appears that the original dissent, and the Government, have confused forfeitures following acquittals with forfeitures following convictions such as those required by 18 USC § 1963 and 18 USC § 848(a)(2).

given that § 924(d) is included in the "Penalties" provision of the statute), this Court has set forth the factors to be considered in construing particular statutes. *Kennedy*, 372 at 169.[12] The application of the factors to this case clearly points to the punitive nature of the sanction in 18 U.S.C. 924(d), thereby requiring that the Fifth Amendment guarantee against Double Jeopardy be applied in the instant case to preclude the subsequent civil forfeiture action.[13]

The first factor, an "affirmative disability or restraint", has previously been recognized in cases dealing with old age benefits,[14] an ex-post facto enactment,[15] and a pro-

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[12] Those relevant factors, which this Court notes may often point in different directions, include (372 U.S. at 168-169; footnotes omitted):

> Whether the sanctions involve an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned.

[13] In *Various Items of Personal Property v. United States*, 282 U.S. 568 (1931), this Court held that a forfeiture of a distillery, warehouse, and denaturing plant connected with a violation of the Revenue Act of 1918 subsequent to a conviction was not barred by the Double Jeopardy Clause since "[t]he forfeiture is no part of the punishment for the criminal offense." 282 U.S. at 581. Thus, if a forfeiture can be shown to be a "part of the punishment for the criminal offense", the Double Jeopardy Clause would apply and a subsequent forfeiture action would be barred.

[14] *Fleming v. Nestor*, 363 U.S. 603 (1960) (statutory termination of social security benefits not punitive and not a deprivation of accrued property rights).

[15] *Ex parte Garland*, 4 Wall (71 U.S.) 333 (1967) (oath required of attorneys seeking to practice before the federal courts was a punishment that violated the constitutional rule against *ex post facto* laws.)

hibited bill of attainder.[16] The term, "affirmative disability or restraint" may, however, be construed in a broader manner than this Court has to date done. A forfeiture, and in the case at bar particularly, plainly imposes a hardship on the owner of the *res*. He is affirmatively disabled and restrained from the actual possession, ownership, and enjoyment of the property forfeited and undeniably restrained in choosing whether to keep or dispose of the property as he sees fit, whatever its value may be.[17] This freedom to own, enjoy, and dispose of personal property acquired in exchange for hard-earned wages is certainly no less valuable to an individual than is the right to avoid the consequences of an ex-post facto law or the right to payment of earned salary.

Further, the forfeiture of Patrick Mulcahey's firearms affirmatively disables him in that it stigmatizes him and sullies his reputation. His prior acquittal, on the criminal charge of engaging in the business of dealing in firearms without a license, conclusively cleared him in the eyes of his peers of any criminal wrongdoing. Yet, if the Government successfully forfeits his firearms, it will have effectively established his guilt in the eyes of his peers. Such a tactic has the practical effect of restricting the personal liberty of an individual to have and enjoy a reputation free of any and all innuendos of guilt.

In consideration of the second factor, whether forfeiture has historically been regarded as punishment, it is not necessary to go any further than this Court's decision in *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416

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[16] *United States v. Lovett*, 328 U.S. 303 (1945) (statute denying payment of earned salary to three named government employees as punishment for past behavior amounted to unconstitutional bill of attainder).

[17] Unlike the distillery equipment in *Various Items, supra*, which can only be used to produce alcohol subject to tax, firearms can be used for purposes other than those which give rise to violations of the Gun Control Act.

U.S. 663 (1974) to understand the history of forfeitures in the United States. In that decision, which concerned a Puerto Rican statute which provided for forfeiture of vessels used for unlawful purposes, this Court noted, after reviewing the history of forfeiture law,[18] that statutes which authorize the forfeiture of property used in connection with a crime further "punitive and deterrent purposes" and "foster[] the purposes served by the underlying criminal statutes, both by preventing further illicit use of the [property] and by imposing an economic penalty, thereby rendering illegal behavior unprofitable." 416 U.S. at 686-687. Forfeitures pursuant to § 924(d) likewise foster the purpose of the Gun Control Act and so must be considered punitive.[19]

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[18] The Government suggests that because "Congress was certainly aware of this history when it enacted 18 U.S.C. 924(d)" (Br. for U.S. 20) that it intended forfeiture pursuant to § 924(d) to be a civil remedial sanction and therefore not barred by a prior criminal acquittal. It is far more likely, however, that in enacting § 924(d) Congress had in mind the decision in *Coffey*, not English history prior to the adoption of the Constitution, and that, therefore, the preclusion doctrine of *Coffey* was meant to be applied to § 924(d).

[19] Throughout its brief, the Government contends that the purpose of § 924(d), in the context of the Gun Control Act itself (as distinguished from "any other criminal law of the United States"), is "to remove from circulation firearms that have been either illegally obtained and distributed or set apart for such use" or to eliminate "stocks of firearms that have been used or intended for use (sic) outside regulated channels of commerce." Br. for U.S. 25-26. In fact, the purpose of § 924(d) in the context of the Gun Control Act itself is somewhat different than propounded by the Government—it is to remove from the hands of individuals who have used or may use certain firearms in violation of the Gun Control Act so that those firearms will not, as a consequence of the acts of such individuals, "be obtained by individuals whose possession of them would be contrary to the public interest." *Huddleston v. United States*, 415 U.S. 814, 825 (1974). Thus, the law is not aimed at eliminating firearms *per se* but rather at removing them from individuals who have or will use them in violation of the Gun Control Act.

With regard to the third factor, while § 924(d) does not require a showing of *scienter*, thereby suggesting, at first blush, that it is not a criminal sanction, this fact does not diminish the punitive nature of the forfeiture sanction of § 924(d) given the fact that to be convicted of violating the Gun Control Act no proof of *scienter* is required. Thus, the elements of proof are identical, indicating that the sanctions should also be considered equivalent.

The operation of a forfeiture of Patrick Mulcahey's firearms would, without question, promote the traditional aims of punishment, retribution, and deterrence, the fourth factor to be considered in determining the punitive nature of a civil sanction. As was made clear with respect to the second factor, this Court has accepted the view that forfeitures which involve property that has been used in connection with a criminal offense "further the punitive and deterrent purposes" (*Calero-Toledo, supra*, at 686) of the criminal law.

The fifth factor used in determining whether a sanction is punitive in nature, a factor which has no more or less significance than any other factor, contrary to the statement of the Government (Br. for U.S. 34), is a consideration of whether the behavior to which it applies is already a crime. In every action under 18 U.S.C. 924(d), the language expressly requires that the forfeited firearms must have been involved in, used or intended to be used in violation of the Gun Control Act or any other criminal law of the United States. Clearly, therefore, this factor is fulfilled in the instant case.

In considering the sixth factor, whether an alternative purpose to which the sanction may rationally be connected is assignable for the sanction, one needs first to examine the Congressional Findings and Declaration of Purpose in the Gun Control Act.[20] Clearly Congress did not in-

[20] Section 101 of Pub. L. 90-618 provides that: "The Congress hereby declares that the purpose of this title is to provide support

tend to deprive law-abiding citizens of the possession, use, and enjoyment of firearms. Thus, as none of the firearms sought to be forfeited here are illegal firearms *per se*, there is, at the very least, a strongly punitive aspect to their forfeiture. Moreover, while there may be some "alternative purpose" for taking legal firearms out of the stream of commerce—as a means of diminishing the possibility that they will fall into the hands of those persons to whom firearms are prohibited—the prime purpose of § 924(d) is to remove firearms from the hands of persons who have or may use them in connection with a criminal offense. Thus, the real effect of § 924(d) is punishment of the person from whom the firearms are seized.

The final factor, whether the sanction appears excessive in relation to the alternative purpose assigned, is satisfied beyond doubt by examining the relationship between the value of the firearms sought to be forfeited in the instant case and the maximum punishment imposed by 18 U.S.C. 924(a). The Complaint for Forfeiture of the firearms alleges that the value of the seized guns was $5,507.00 (Joint App. 7). Patrick Mulcahey, in his answer, challenged that figure and alleged the true value to be in excess of $15,000.00. In either event, the totals reflect amounts in excess of the maximum fine of $5,000.00 which could be imposed on Mulcahey under 18 U.S.C. 924(a) had he been convicted of the one charge in the indictment.

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to Federal, State, and local law enforcement officials in their fight against crime and violence, and it is not the purpose of this title to place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, or use of firearms appropriate to the purpose of hunting, trapshooting, target shooting, personal protection, or any other lawful activity, and that this title is not intended to discourage or eliminate the private ownership or use of firearms by law-abiding citizens for lawful purposes, or provide for the imposition by Federal regulations of any procedures or requirements other than those reasonably necessary to implement and effectuate the provisions of this title."

These factors, as noted above, are intended to be examined *only* "in the absence of conclusive evidence of congressional intent" as to the punitive nature of the sanction. Here, however, there exists "conclusive evidence" that Congress intended forfeitures under 18 U.S.C. 924(d) to be punitive: the designation of 18 U.S.C. 924 as the "Penalties" provision. Had Congress intended forfeiture under 18 U.S.C. 924(d) to be remedial, rather than punitive, it could easily have included the forfeiture provision under a separate and distinct section of the Gun Control Act. As it did not, it is apparent that every sanction under 18 U.S.C. 924 provides for a penalty whether it is a fine, imprisonment, or forfeiture. Moreover, the fact that Congress did not separate the sanctions of imprisonment, fine, and forfeiture and enacted them simultaneously, a matter this Court has found to be "quite significant" (*Ward, supra*, at 250), indicates that Congress clearly intended that a forfeiture be viewed as punitive. Thus, forfeiture pursuant to § 924(d) is punitive and, because of the Double Jeopardy Clause of the Fifth Amendment, precludes the forfeiture of Mulcahey's firearms.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

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In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER

v.

ONE ASSORTMENT OF 89 FIREARMS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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REPLY BRIEF FOR THE UNITED STATES

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1. In *Helvering* v. *Mitchell*, 303 U.S. 391 (1938), the Court held that the defendant's prior acquittal on charges of willfully attempting to evade taxes did not preclude a subsequent proceeding against him to recover a monetary penalty for fraudulent avoidance of income tax. In our opening brief (Br. 14-16) we argued that *Helvering* supported the position that *Coffey* v. *United States*, 116 U.S. 436 (1886), precludes the imposition only of criminal punishments following a criminal acquittal. Respondent disputes that argument (Resp. Br. 10-11), contending that the *Helvering* Court distinguished *Coffey* "on the grounds that *Helvering* involved a 'civil administrative sanction,' not a penalty and most certainly not a forfeiture" connected to criminal conduct. That contention, however, hardly rebuts the government's submission.

There can be no serious question that the penalty involved in *Helvering* was related to allegedly criminal conduct. Indeed, the conceded fact that the criminal charge and the penalty proceeding "[arose] out of the same transactions and facts" (303 U.S. at 398) was the basis for Mitchell's argument that the penalty proceeding was barred by the prior acquittal. It is equally clear that the holding in *Helvering* did not rest upon any distinction between a forfeiture and a strictly monetary penalty (Resp. Br. 10); in fact, the Court equated the two types of sanctions, concluding that they were civil in nature because they have historically been "enforcible by civil proceedings" (303 U.S. at 400). Contrary to respondent's claim, therefore, the *Helvering* Court distinguished *Coffey* solely on the ground that *Helvering*, like the case at bar, involved a *civil* proceeding that required a different degree of proof from the prior criminal charge (303 U.S. at 405).

2. Respondent agrees (Br. 11-12) that, because there is a "difference in the degree of the burden of proof in criminal and civil cases" (*Helvering*, 303 U.S. at 391), res judicata is no bar to a civil action following a criminal acquittal. He disputes our argument (U.S. Br. 14), however, that *Helvering* also prevents application of collateral estoppel in the same circumstances. But, whether or not *Helvering* settles this issue (see U.S. Br. 14-15), any doubt regarding the inapplicability of collateral estoppel to successive criminal and civil cases was expressly resolved in *One Lot Emerald Cut Stones* v. *United States*, 409 U.S. 232 (1972). There the Court squarely held that "the difference in the burden of proof in criminal and civil cases precludes application of the doctrine of collateral estoppel" (409 U.S. at 235).[1]

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[1]Respondent places great reliance (Resp. Br. 13) on the statement in *One Lot Emerald Cut Stones* that "[c]ollateral estoppel would bar a forfeiture under [19 U.S.C.] 1497 [the pertinent forfeiture statute] if, in the earlier criminal proceeding, the elements of a § 1497 forfeiture had

3. The crucial issue in this case is whether forfeiture under 18 U.S.C. 924(d) is a civil or a criminal penalty.[2] In our opening brief (Br. 17-36) we argued that, under the analysis set forth in *United States* v. *Ward*, 448 U.S. 242, 248-249 (1980), the forfeiture penalty established by Section 924(d) is plainly civil in nature. Both respondent and the amicus argue to the contrary that *Ward* demonstrates the criminal nature of a Section 924(d) forfeiture. For the most part, our opening brief answers the claims raised by respondent and the amicus concerning this issue, but certain of their assertions warrant a specific reply.

a. Amicus takes the government to task (Amicus Br. 33) for attempting to "resurrect a pre-*Helvering* analysis" in our construction of Section 924(d). With due respect, it is amicus — not the government — that is attempting to turn back the clock.

Throughout its brief, amicus urges the Court to focus on the subjective effect of forfeiture upon individual gun owners, suggesting that this approach deserves "precedence" over any other form of analysis (Amicus Br. 32). It is true that, in several of the cases most heavily relied upon by the amicus, this Court emphasized the subjective impact of avowedly civil penalties in the course of concluding that, notwithstanding express legislative classifications and possible legislative objectives other than punishment, the penalties were in fact criminal and punitive. See Amicus Br.

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been resolved against the Government" (409 U.S. at 234). This argument, however, simply ignores the fact that *One Lot* clearly set forth a two-pronged test for the proper application of collateral estoppel: both proceedings must (1) involve the same elements (409 U.S. at 234) *and* (2) proceed under the same burden of proof (*id.* at 235).

[2]Although the amicus brief challenges at some length (Amicus Br. 5-34) the government's analysis of *Coffey* v. *United States*, it nevertheless recognizes that *Coffey* merely precludes the imposition of criminal — not civil — penalties following a criminal conviction (Amicus Br. 34).

at 7, 8, 9, 22, 27, 28, 39, citing *United States* v. *Constantine*, 296 U.S. 287 (1935), and *United States* v. *La Franca*, 282 U.S. 568 (1931). Since *Helvering*, however, where it was expressly noted that "Congress may impose both a criminal and a civil sanction in respect to the same act or omission" (303 U.S. at 399), this Court has never — to the government's knowledge — concluded that a putatively civil penalty was in fact criminal in nature. The Court should surely hesitate before returning to the subjective and essentially standardless pre-*Helvering* analysis advocated by the amicus. As set out at length in our opening brief (Br. 17-36), Congress clearly indicated that Section 924(d) was to be treated as a civil, remedial sanction, and the subjective impact of the penalty on gun owners is not so punitive "as to negate that intention." *United States* v. *Ward*, 448 U.S. at 249.[3]

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[3]In quoting from *Helvering* on pages 32-33 of its brief, amicus inserts the word "prior" in Justice Brandeis's analysis to suggest that, in construing a particular penalty provision, a court should not focus upon the precise constitutional right purportedly infringed by the imposition of the penalty. The alteration of meaning caused by insertion of new language in Justice Brandeis's opinion undermines the conclusion amicus asks the Court to draw. In any event, this Court's recent decision in *United States* v. *Ward* refutes amicus's submission. In *Ward*, the Court did not conclude that the "classification of the sanction" as civil or criminal took "precedence" over the "type of procedural rule invoked" (Amicus Br. 32). Rather, the Court inquired whether the penalty was " 'so far criminal in [its] nature' as to trigger the Self-Incrimination Clause of the Fifth Amendment." 448 U.S. at 253-254. Thus, as set forth in our brief (Br. 36-41), a particular penalty may be "quasi-criminal" for some constitutional purposes, but not others. Compare *One 1958 Plymouth Sedan* v. *Pennsylvania*, 380 U.S. 693, 700 (1965) (exclusionary rule applies to state forfeiture proceeding), with *Various Items of Personal Property* v. *United States*, 282 U.S. 577, 581 (1931) (Double Jeopardy Clause does not apply to in rem forfeitures). The amicus's monolithic approach — whereby a particular penalty would be classified as either civil or criminal for all purposes — is simply not the law.

b. Amicus asserts (Br. 40-41) that the Gun Control Act was designed solely to punish criminals. But, while the Gun Control Act was obviously designed in part to punish criminals, the statute had much broader overall objectives, including "control[ling] the indiscriminate flow of such weapons across State borders[,]" "assist[ing] and encourag[ing] States and local communities to adopt and encourage stricter gun control laws" (H.R. Rep. 1577, 90th Cong., 2d Sess. 8 (1968)), and "restricting public access to firearms" (*Huddleston* v. *United States*, 415 U.S. 814, 824 (1974)). Section 924(d) is designed to eliminate stocks of firearms that have been used or intended for use outside regulated channels of commerce, and this remedial goal clearly advances the "broad prophylactive purpose" of the gun control legislation. *Dickerson* v. *New Banner Institute, Inc.*, No. 81-1180 (Feb. 23, 1983), slip op. 15.

Amicus's argument (Br. 41) based on the claim that Section 924(d) "authorizes forfeitures only following conviction" is unpersuasive because its premise is flatly wrong. In contrast to the criminal provisions of 18 U.S.C. 922, which proscribe only the completed act of engaging in the business of dealing in firearms without a license, the forfeiture sanction reaches firearms that are merely "intended to be used" in violation of the law. Forfeiture under Section 924(d), therefore, is not predicated on criminal wrongdoing, let alone a criminal conviction. *United States* v. *One Assortment of Seven Firearms*, 632 F.2d 1276, 1278 (5th Cir. 1980) (forfeiture may be ordered even where no actual criminal violation occurs).[4]

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[4]This factor alone rebuts amicus's suggestion (Br. 58-61) that there is no non-punitive, remedial purpose behind Section 924(d). The remedial goals of the statute are indeed reached by means of "incapacitation" (Amicus Br. 59), but the express terms of the statute prevent persons other than "criminals" from engaging in unregulated commerce in lethal weapons. Thus, the express remedial objectives of the statute extend beyond "criminal punishment" (Amicus Br. 59).

c. Turning to the considerations set forth in *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 168-169 (1963), respondent (Br. 16-17) and amicus (Br. 51) argue that forfeitures have "historically been regarded as punishment." But just the opposite is true. As the Court stated in *Helvering*, 303 U.S. at 400, "[f]orfeiture of goods or their value " * * * are * * * sanctions * * * enforcible by civil proceedings since the original revenue law of 1789 * * * [and] have been upheld against the contention that they are essentially criminal."

d. Amicus contends (Br. 49-50) that the decision in *United States* v. *United States Coin & Currency*, 401 U.S. 715 (1971), contradicts our argument (Br. 32) that the *Mendoza-Martinez* scienter factor supports the civil nature of the sanction established in Section 924(d). In *Coin & Currency*, the Court held that applicable administrative remission and mitigation provisions under 26 U.S.C. 7302 limited forfeiture to persons "significantly involved in a criminal enterprise." 401 U.S. at 721-722. Therefore, the Court held that, under its earlier ruling in *Boyd* v. *United States*, 116 U.S. 616 (1886), the self-incrimination clause was applicable to forfeiture proceedings under Section 7302. 401 U.S. at 721-722. On the ground that a forfeiture under Section 924(d) is subject to the same remission and mitigation provisions applicable to Section 7302 actions, amicus argues that Section 924(d) is a criminal penalty because it "encompasses an implicit requirement of *scienter*" (Amicus Br. 50). However, the administrative remission and mitigation procedures relied upon by amicus demonstrate, if anything, that the forfeiture sanction is totally devoid of any scienter constraint, and is therefore civil in nature.

Administrative remission and mitigation procedures have been created precisely because in rem forfeitures do not depend upon any evidence of criminal intent; the exercise of administrative grace inherent in remission or mitigation

prevents unduly harsh application of a sanction that does not itself embody a scienter requirement. Indeed, in *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 688-690 (1974), this Court expressly held that its prior decision in *Coin & Currency* — the case upon which amicus grounds its scienter argument — did not bar an in rem forfeiture even though the property owner was totally innocent of criminal wrongdoing. Thus, the Court recognized that forfeiture does not turn upon the criminal (or innocent) intent of the property owner. In a Section 924(d) case, for example, a collection of firearms could be forfeited even if the actual owner of the collection did not use or intend to use the guns in violation of the Gun Control Act.[5] The administrative procedures cited by amicus "mitigate the harshness" of this result (*Calero-Toledo*, 416 U.S. at 689-690 n.27), but do not alter the undeniable fact that forfeiture under Section 924(d) is not a "criminal" punishment because it can indeed be imposed upon an innocent property owner.[6]

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[5]This could occur if the owner of the collection lent it to a third party who subsequently intended to use the firearms in violation of the Gun Control Act. Cf. *Calero-Toledo* v. *Pearson Yacht Leasing Co.* (innocent owner leased forfeited yacht to drug traffickers).

[6]Amicus's scienter argument also disregards the primary analytical importance of this Court's decision in *Coin & Currency*. In that case, the Court concluded that a forfeiture statute may be "so far criminal in [its] nature" as to trigger the Fifth Amendment's self-incrimination clause. *United States* v. *Ward*, 448 U.S. at 253-254. The Court did not, however, intimate that the "quasi-criminal" character of the forfeiture sanction required application of the full panoply of criminal law constitutional protections to a forfeiture proceeding. See U.S. Br. 36-41. Thus, by focusing on "scienter" the amicus misses the main import of *Coin & Currency* — *i.e.*, that "quasi-criminal" forfeiture actions need not be processed in accordance with the full range of criminal procedural and substantive rights. See *Various Items of Personal Property* v. *United States*, 282 U.S. at 581 (an in rem forfeiture is "no part of the punishment for the criminal offense" for purposes of the Double Jeopardy Clause).

d. Finally, relying principally on the Court's observation in *Helvering*, 303 U.S. at 401, that the tax penalty at issue there was remedial because it was intended "as a safeguard for the protection of the revenue and to reimburse the Government for the heavy expense of investigation" of tax fraud, amicus argues (Br. 52-53) that the fact that forfeitures under Section 924(d) are not compensatory automatically establishes that they are not remedial. But, as the *Helvering* Court also observed, "[r]emedial sanctions may be of varying types" (303 U.S. at 399). Even amicus recognizes (Br. 40) that the Gun Control Act was passed, in part, to alleviate the "senseless slaughter" arising from unregulated interstate firearms traffic. H.R. Rep. 1577, *supra*, at 7. Section 924(d) was plainly drafted to further this vital legislative goal, and amicus's assertion that the statute is not "remedial" merely because it is not "compensatory" ignores the broad prophylactic aim of the Gun Control Act.[7]

For the reasons set forth above and in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

NOVEMBER 1983

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[7]In addition, as noted in our opening brief (Br. 25-26 n.11), "forfeited firearms may, in a very real sense, 'reimburse the Government for the heavy expense of investigation' of a gun control violation since the federal government can and does use the forfeited firearms."

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No. 82-1047

IN THE
SUPREME COURT OF
THE UNITED STATES

October Term, 1982

UNITED STATES OF AMERICA,

Petitioner,

v.

ONE ASSORTMENT OF 89 FIREARMS,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF
APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF THE JEROME N. FRANK LEGAL SERVICES ORGANIZATION OF THE YALE LAW SCHOOL AS AMICUS CURIAE IN SUPPORT OF CLAIMANT/RESPONDENT

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QUESTION PRESENTED

Is an *in rem* forfeiture predicated upon the use of property in a criminal offense punishment within the meaning of the Fifth Amendment, such that the forfeiture is barred by the prior acquittal of the owner on the underlying criminal charge?

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In the
Supreme Court of
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October Term, 1982

No. 82-1047

United States of America,

Petitioner,

v.

One Assortment of 89 Firearms,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

BRIEF OF THE JEROME N. FRANK LEGAL SERVICES ORGANIZATION OF THE YALE LAW SCHOOL AS AMICUS CURIAE IN SUPPORT OF CLAIMANT/ RESPONDENT

INTEREST OF THE AMICUS CURIAE

The Jerome N. Frank Legal Services Organization (LSO) is the clinical legal education program of the Yale

Law School. Through its participating students and supervising faculty, LSO provides legal assistance to certain categories of individuals who could not otherwise obtain quality legal services, including federal and state prisoners, children, aliens and mental patients. LSO's project at F.C.I. Danbury has counselled over 3000 federal prisoners since its founding in 1970, making it one of the most experienced programs of legal assistance to federal prisoners in the country. Scores of those prisoners have had legal difficulties under the federal forfeiture laws, and students and faculty at LSO have represented several inmates in federal district and appellate courts in Connecticut and New York, and have counselled clients with forfeiture-related problems in other federal districts.

LSO now represents the Petitioner in a case raising issues closely

related to those presented by the instant case. That case, Aponte v. United States, is now pending before this Court on a Petition for a Writ of Certiorari.1/ Also, LSO has appeared before this Court, both as counsel,2/

1/ Aponte v. United States, No. 82-5857, petition filed Dec. 7, 1982. Counsel understands that the Petition in this case was submitted to the Conference on March 18, 1983, and may be being held pending the disposition of the instant case. Although both Aponte and 89 Firearms require the characterization of a federal forfeiture penalty as criminal or civil in nature, the challenge in Aponte is to the constitutionality under the Due Process Clause of 21 U.S.C. §881(d) and 19 U.S.C. §1615, which shift the burden of proof from the Government and onto the claimant to seized property. Under § 924(d), the burden of proof by a preponderance of the evidence rests with the Government. See Gov't Br. at 4-5, 22-23. Thus, the statutory construction of 18 U.S.C. §924(d) in this case, for the purposes of the Double Jeopardy Clause, will not fully dispose of the Aponte case.

2/ Connecticut Board of Pardons v. Dumschat, No. 79-1997, 452 U.S. 458 (1980).

and as amicus,3/ in other cases involving prisoners' rights. The law school faculty who supervise students in LSO also have worked on other cases before this Court.4/

In keeping with its role as representative of the individuals who suffer forfeitures, and in keeping with its academic mission,5/ LSO's purpose in filing this amicus brief is to present facts and legal principles necessary to this Court's full consideration of the nature and implications of the federal

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3/ See, e.g., Weinstein v. Bradford, No. 74-1287, 423 U.S. 147 (1975).

4/ See, e.g., . TIAA-CREF v. Spirt, No. 82-791; Norris v. Arizona, No. 82-52; Peters v. TIAA-CREF, No. 82-794; St. Paul Fire & Marine Ins. v. Barry, No. 77-240, 438 U.S. 531 (1978).

5/ For example, LSO faculty and students have prepared Congressional testimony and several scholarly papers concerning the federal forfeiture laws, including a student Note scheduled to appear in a forthcoming issue of The Yale Law Journal.

forfeiture statutes.

Both parties have consented to the filing of this amicus brief.

STATUTE INVOLVED

Section 924(d) of Title 18 provides:

> Any firearms or ammunition involved in or used or intended to be used in, any violation of the provisions of this chapter or any rule or regulation promulgated thereunder, or any violation of any other criminal law of the United States, shall be subject to seizure and forfeiture and all provisions of the Internal Revenue Code of 1954 relating to the seizure, forfeiture, and disposition of firearms, as defined in section 5845(a) of that Code, shall, so far as applicable, extend to seizures and forfeitures under the provisions of this chapter.

SUMMARY OF ARGUMENT

The Court of Appeals for the Fourth Circuit, sitting en banc, held in this case that a punitive forfeiture under 18 U.S.C. § 924(d) is precluded by a prior acquittal of the owner on the underlying criminal charge. That ruling is required by the Double Jeopardy

Clause and supported by a long line of decisions in this Court.

The prohibition of the Double Jeopardy Clause is triggered whenever someone is twice put in jeopardy of punishment;6/ whether forfeitures under 18 U.S.C. § 924 (d) are precluded following a criminal acquittal thus depends upon whether the forfeiture is punishment.7/ As a genre, however, forfeitures serve many purposes. Like fines, forfeitures can be used either to further the remedial goals of government or to vindicate the punitive policies of the criminal law.

Thus, unlike infamous punishments,8/ forfeitures are not classified

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6/ See, e.g., Breed v. Jones, 421 U.S. 519, 528-29 (1975).

7/ Compare Coffey v. United States, 116 U.S. 436, 443 (1885), with Helvering v. Mitchell, 303 U.S. 391, 398-399 (1937).

8/ See, e.g., Wong Wing v. United States, 163 U.S. 228 (1896).

as criminal penalties on the basis of their inherent nature. Rather, they are classified according to the purpose that they serve in a given case.9/ Consequently, it is only by analyzing the punitive versus remedial goals of Congress and the effect of the statute that the legal nature of the sanction may be discerned.10/

This dependent nature of forfeitures means that forfeitures are uniquely susceptible to misuse as essentially criminal sanctions under the guise of civil remedies. It is for this reason that in cases where forfeitures and other penalties are enforced in civil proceedings, this Court has inquired not only into the manifest

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9/ Helvering v. Mitchell, 303 U.S. 391, 399-401 (1937).

10/ See, e.g., United States v. Ward, 448 U.S. 242, 248 (1980); United States v. Constantine, 296 U.S. 280, 294 (1935).

legislative intent in labeling the sanction, but also into the underlying purpose and the effect of the sanction.11/ Whether or not the purpose and effect of the sanction is punitive depends largely upon whether or not the penalty is imposed upon someone as a consequence of his own, knowingly committed criminal acts.12/

Once identified as punitive or remedial, the functional, legal nature of the forfeiture will dictate whether the constitutional provisions restricting the imposition of criminal punishment are applicable. The rule of Coffey v. United States, 116 U.S. 436,

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11/ See, e.g., United States v. Ward, supra; Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1962); United States v. Constantine, supra.

12/ E.g., United States v. United States Coin and Currency, 401 U.S. 715, 718 (1971); One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 700 (1965); Boyd v. United States, 116 U.S. 616, 637 (1885).

443 (1885), as endorsed and refined by almost a century of judicial interpretation,13/ is clear: a punitive forfeiture occasioned by criminal misconduct is barred by an acquittal on the underlying criminal offense.

In this case, the Court of Appeals recognized the punitive function of forfeitures under 18 U.S.C. § 924(d) and applied the rule of Coffey. That result is inescapable under the test set forth by this Court for the classification of a penalty as essentially crimi-

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13/ See, e.g., One Lot Emerald Cut Stones and One Ring v. United States, 409 U.S. 232, 235-236 (1972); Helvering v. Mitchell, 303 U.S. 391, 398, 405-406 (1937); United States v. LaFranca, 282 U.S. 568, 573 (1930); Murphy v. United States, 272 U.S. 630, 632 (1926); Stone v. United States, 167 U.S. 178, 187 (1896); Boyd v. United States, 116 U.S. 616, 634 (1885). See also United States v. Chouteau, 102 U.S. 603 (1880); United States v. Ulrici, 102 U.S. 612 (1880); United States v. McKee, 26 Fed. Cas. 1116 (4 Dill. 128) (Circuit Court, E.D. Mo. 1877). See also cases cited at 27 ALR2d 1137, 1140-41.

nal or civil in United States v. Ward, 448 U.S. 242, 248-49 (1980).

First, the legislative history of section 924(d) forfeitures reveals that the manifest legislative intent in creating 18 U.S.C. § 924(d) was to punish and deter offenses against the criminal law.14/ Moreover, Congress's intent in 18 U.S.C. § 924(d) was to punish by forfeiture only those persons found guilty of the underlying criminal offense; forfeiture following acquittal does not appear to be authorized by the statute.15/

Second, according to the list of factors enumerated by this Court in Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1962), and adopted in Ward,

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14/ See Pub. L. No. 90-618, Section 101; H.R. 1577, 90th Cong., 2d Sess. reported in [1968] U.S. Code Congressional and Administrative News, 4410, 4412-13; S.R. 1501, 90th Cong., 2d Sess. (1968).

15/ See footnote 14, supra.

the purpose and effect of forfeiture under 18 U.S.C. § 924(d) is to punish criminal wrongdoing. This punitive goal of the statute is evidenced primarily by the fact that forfeiture under §924(d) is predicated not only upon criminal conduct, but also upon the 'bad intent' which is a requisite for all punishment.

Specifically, 18 U.S.C. § 924(d) is designed to punish only those persons who -- along with their property -- are 'significantly involved in criminal enterprise.' By authorizing remission and mitigation of forfeiture for persons who are innocent of the underlying offense,16/ the statute implicitly contains a requirement of scienter in justification of forfeiture. Congress thus singled out for the penalty of forfeiture only those persons

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16/ United States v. United States Coin and Currency, 401 U.S. 715, 722 (1971).

who are actively guilty of criminal wrongdoing. That selection shows that the sanction is punishment.

The other Mendoza-Martinez tests confirm this conclusion. For example, forfeitures traditionally have served as punishment, 17/ and forfeiture under § 924(d) is an affirmative disability in that it involves a governmental taking of private property, and not just the revocation of a benefit granted as a matter of governmental largesse. 18/ Forfeitures under § 924(d) also promote the traditional aims of punishment -- retribution and deterrence. 19/

Finally, there is no distinct alternative purpose for these forfeitures other than punishment for cri-

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17/ O. Holmes, The Common Law, Lecture 1 at 10, 34 (1881); W. Blackstone, Commentaries, *375.

18/ Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168 (1962).

19/ See footnote 14, supra.

minal wrongdoing. The argument that the forfeiture is preventative in that it keeps dangerous firearms out of the stream of illegal commerce assumes that the owner of the firearms would sell them illegally but for the forfeiture -- despite the fact of acquittal on the charge of illegal sale. This purportedly preventative goal thus collapses into incapacitation with respect to criminal behavior, and, therefore, is not distinct from the goals of punishment.20/

In sum, both the legislative history of forfeiture under 18 U.S.C. § 924(d) and the purpose and effect of the sanction repeatedly invoke the spectre of criminal guilt. The forfeiture thus constitutes punishment within the meaning of the Fifth Amendment, and,

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20/ See H.L. Packer, The Limits of Criminal Sanction (1968) at 48-53.

under Coffey, may not be visited upon an individual in a civil proceeding following his acquittal on the underlying criminal charges.

ARGUMENT

I. FORFEITURE PROCEEDINGS ARE PRECLUDED WHENEVER THE FORFEITURE WOULD CONSTITUTE A SECOND PUNISHMENT FOR THE UNDERLYING CRIMINAL CONDUCT.

The Double Jeopardy Clause provides that no one "shall for the same offense be twice put in jeopardy of life or limb." In application, the Clause has come to mean that no one may twice be punished -- or twice be put in jeopardy of punishment -- for the same offense. Breed v. Jones, 421 U.S. 519, 528-29 (1975).

This principle was invoked by this Court with respect to forfeitures predicated upon criminal misconduct in Coffey v. United States, 116 U.S. 436 (1885), the case primarily relied upon

by the Fourth Circuit in this case. In Coffey this Court observed:

> There could be no new trial of the criminal prosecution after the acquittal in it; and a subsequent trial of the civil [forfeiture] suit amounts to substantially the same thing . . . [T]he facts cannot be again litigated between [the parties], as the basis of any statutory punishment.

Id. at 443 (emphasis supplied).21/

Coffey involved a forfeiture which Congress had listed right along-

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21/ Although Coffey defined the rule in terms of preclusion and collateral estoppel, the opinion relied heavily on United States v. McKee, 26 Fed. Cas. 1116 (4 Dill. 128) (No. 15,688) (Circuit Court E.D. Mo. 1877), which clearly was decided on grounds of double jeopardy (see discussion, infra, pp. 17-18). 116 U.S. at 445. Moreover, this Court has squarely held that the rule of collateral estoppel in federal criminal law is embodied in the Fifth Amendment guarantee against double jeopardy. Ashe v. Swenson, 397 U.S. 436, 445-46 (1969). Indeed, Ashe cited Coffey for the rule of collateral estoppel in federal criminal law, id., at 443 n.7, thus indicating retrospectively that the decision in Coffey would be required under the Double Jeopardy Clause.

side fine and imprisonment as a punishment for criminal behavior. 116 U.S. at 437. The statute authorizing forfeiture in the instant case, 18 U.S.C. § 924, is structured in precisely the same way, demonstrating that the forfeiture is simply an additional statutory punishment for conduct already defined to be a crime.22/

The Government has acknowledged that the real "bone of contention" in this case is this characterization of forfeiture under 18 U.S.C. § 924(d) as punitive for the purpose of applying the rule of Coffey. (Gov't Br. at 10.) The Government also has asserted, however, that Coffey is the "single aged precedent" upon which the Fourth Circuit based its entire holding in this case, and has attempted to discredit the rule of that seminal precedent. (Gov't Br.

22/ See discussion infra at pp. 37-39.

at 11-13.) A review of the cases both before and after Coffey reveals, however, that this Court frequently has reaffirmed the rule of Coffey that forfeitures and penalties which serve punitive purposes must be treated as criminal sanctions which entail jeopardy of punishment.

For example, Coffey was presaged at the Circuit Court level in 1877 by United States v. McKee, 26 Fed. Cas. 1116 (4 Dill. 128) (No. 15,688) (Circuit Court, E.D. Mo. 1877), and in the Supreme Court by United States v. Chouteau, 102 U.S. 603 (1880), and United States v. Ulrici, 102 U.S. 612 (1880). In McKee, Justice Miller, riding Circuit, noted that the government's suit seeking a penalty of double the amount of taxes due on distilled spirits -- following acquittal on criminal charges for the same acts -- was

prohibited as an attempt to punish twice for the same crime. Id. at 129-130.

Similarly, this Court ruled in Chouteau and Ulrici that a purportedly civil penalty for violation of federal tax law was precluded by the Government's prior settlement with the defendant for the offense charged. Given that the civil action and the criminal prosecution followed upon the same criminal transactions, the Court in Chouteau held that the monetary penalty prescribed for the offense was intended as part punishment for it. 102 U.S. at 610. Therefore:

> [The defendant] has been punished in the amount paid upon the settlement for the offence with which he was charged, and that should end the present action, according to the principle on which a former acquittal or conviction may be invoked to protect against a second punishment for the same offence. To hold otherwise would be to sacrifice a great principle to the mere form of procedure ...

Id. at 611 (emphasis supplied).

The cases following Coffey also illustrate this Court's adherence to the rule that punitive sanctions cannot hide behind civil labels of convenience in contravention of constitutional principles. For example, Boyd v. United States, 116 U.S. 616 (1885), like both Coffey and the instant case, involved a forfeiture which was prescribed by statute, along with fine and imprisonment, as a penalty for a criminal offense. Id. at 617. The issue before the Court was whether the claimant to the seized property could invoke the Fourth and Fifth Amendment protections against unreasonable search and seizure and compulsory self-incrimination. Central to the Court's reasoning in support of the claimant's position was the Court's conclusion that:

> . . . proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offenses committed by him, though they be civil in form, are in their nature, criminal.

Id. at 634 (emphasis supplied). See also Lees v. United States, 150 U.S. 476, 480 (1893) (applying Boyd because civil proceeding to collect punitive monetary penalty for the importation of aliens in violation of federal statutory prohibition "unquestionably criminal in its nature").23/

23/ Although not all of the declarations of Boyd have "stood the test of time," Fisher v. United States, 425 U.S. 391, 407 (1976), the conclusion that forfeitures incurred by reason of the commission of criminal offenses "are in their nature criminal" has survived -- the Government's statement to the contrary notwithstanding. Compare Fisher, 425 U.S. at 407-408, with Gov't Br. at 38. That rule also has been reinforced by other recent cases. See, e.g., United States v. United States Coin and Currency, 401 U.S. 715, 718 (1971) (monetary forfeitures occasioned by criminal offenses indistinguishable from criminal fines); One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 697-98, 700 (1965) (emphasizing "authoritative statement" and "continuing validity" of Boyd holding that such forfeitures are criminal in nature). Indeed, even One Lot Emerald Cut Stones and One Ring v. United States, 409 U.S. 232 (1972), a case

(Footnote continued)

The Court returned to the double jeopardy question in Stone v. United States, 167 U.S. 178 (1896). In that case, the Court carefully distinguished "property...forfeited to the United States on account of the violation of certain [criminal] statutes," id. at 184 (emphasis in original), from a fine "for the value of property wrongfully converted by the defendant." Id. at 187. This distinction between punitive sanctions and remedial damages is one which later became firmly ensconced in American jurisprudence in Helvering v. Mitchell, 303 U.S. 391 (1937), and which forms the basis of the test for classifying penalties recently set forth in

(Footnote continued)

heavily relied on by the Government in this case (e.g., Gov't Br. at 14-15, 41), acknowledges that the difference between forfeitures as civil sanctions and forfeitures as criminal penalties depends upon whether or not the forfeiture is predicated upon criminal wrongdoing. Id. at 236 n. 6.

United States v. Ward, 448 U.S. 242, 248-249 (1980).

The Government thus has glided over the most important element in this case, the nature of the conduct for which the forfeiture is imposed. The decisions of this Court emphasize that the characterization of a forfeiture penalty as "criminal" or "civil" is largely determined by the classification of the conduct which justifies the penalty as criminal or not. 24/ It is for this reason that this Court has emphasized the importance of personal cul-

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24/ See, e.g., One Lot Emerald Cut Stones and One Ring v. United States, 409 U.S. 232, 236 n.6 (1972); United States v. United States Coin & Currency, 401 U.S. 715, 718 (1971); One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 700 (1965); United States v. Constantine, 296 U.S. 287, 294 (1935); United States v. LaFranca, 282 U.S. 568, 575 (1930); Lipke v. Lederer, 259 U.S. 557, 562 (1922); Stone v. United States, 167 U.S. 178, 187 (1896); Boyd v. United States, 116 U.S. 616, 637 (1885); Coffey v. United States, 116 U.S. 436, 442-43 (1885).

pability in distinguishing punitive from remedial sanctions.25/

In making this careful distinction, the Court in Stone reaffirmed the correctness of the Coffey decision, emphasizing that:

> The proceeding by libel against Coffey, although civil in form was penal in its nature, because it sought to have an adjudication of the forfeiture of his property for acts prohibited. It was, as we have seen, a case in which a punishment, denounced by statute, was sought to be inflicted as a consequence of the existence of facts that were in issue and had been finally determined against the United States in a criminal proceeding.

25/ United States v. United States Coin and Currency, 401 U.S. 715, 722 (1971) (forfeitures are punishment when "they are intended to impose a penalty only upon those who are significantly involved in a criminal enterprise"); Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1962) (the characterization of a sanction as punitive depends, among other things, upon whether the sanction "comes into play only on a finding of scienter", and "whether the behavior to which it applies is already a crime").

Id. at 187 (emphasis supplied).26/

The Court in Stone also acknowledged that when a sanction pursued by the Government is punishment and not damages, the rule is that:

> The judgment of acquittal in the criminal proceeding ascertained that the facts which were the basis of the proceeding, and are the basis of this one [for forfeiture], and which are made by the statute the foundation of any punishment, personal or pecuniary, did not exist.

Id. at 186, quoting, Gelston v. Hoyt, 16 U.S. (3 Wheat.) 246 (1818).27/ This is

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26/ Although the Court finally determined that the sanction in Stone was not punishment, Coffey was not weakened by this distinction. In a later case, ultimately decided under Philippine local law rather than constitutional principles, the Court noted that the punitive character of the civil action at issue would "bring it under the principles of Coffey . . . rather than Stone." Chantangco v. Abaroa, 218 U.S. 476, 483 (1910).

27/ The Solicitor General points to the Stone case for the proposition that

(Footnote continued)

not to say that the judgment of a court can, in a metaphysical sense, establish as a matter of fact that past incidents either did or did not occur. (But cf. Gov't Br. at 9.) Rather, the rule is that society accepts the judgment in a court of law as a conclusive statement of the facts which we will henceforth

(Footnote continued)

that when the burden of proof differs as between a criminal and a civil proceeding, "'the judgment in the criminal case does not make the issues in the present [civil] case res judicata,'" (Gov't. Br. at 15, quoting Stone at 188). The point made by the Stone case, however, is that the difference in the burden of proof as between two proceedings is only relevant given the prior determination that the first is criminal while the second is not. When both involve the imposition of punishment, as was the case in Coffey and as is true in this case, "[t]he judgment of a court of concurrent jurisdiction, directly upon the point, is, as a plea, a bar, or, as evidence, conclusive . . ." Stone at 186, quoting Coffey, 116 U.S. at 445. Properly analyzed, Stone thus supports Respondent, not the Government. See also One Lot Emerald Cut Stones and One Ring v. United States, 409 U.S. 232, 235 (1972); Murphy v. United States, 272 U.S. 630, 632 (1926).

use to guide our behavior toward the parties involved. When this behavior entails the imposition of punishment in both a criminal trial and a punitive forfeiture proceeding, the judgment of the former is conclusive for the purpose of the latter.

The case of Murphy v. United States, 272 U.S. 630 (1926), is to the same effect. The Court in Murphy recognized that if the suit for the abatement of the nuisance of a distillery was indeed a punishment for violation of Prohibition, then a prior acquittal on criminal charges would bar the action. Id. at 632. The Court concluded, however, that the abatement was not punishment, but regulation.28/

28/ As support for its conclusion, the Court noted that defendant could avoid the closing of his property by simply posting a bond conditioned against its illegal use. 272 U.S. at 632. Here, by contrast, the seizure, forfeiture, and destruction of Respondent's firearms constitutes

(Footnote continued)

United States v. LaFranca, 282 U.S. 568 (1930), also underscores the importance of close judicial scrutiny of burdens imposed upon individuals at the hands of Government. In that case, the Court held that a civil proceeding to collect a tax for the illegal sale of liquor was precluded by a prior criminal conviction, because the monetary fine purported by Congress to be a tax was in fact imposed for the purpose of punishment. Id. at 572. The fact that the penalty was recoverable in a civil proceeding was irrelevant:

(Footnote continued)

> a permanent deprivation of his property and, possibly, liberty as well. (See Amendment III, U.S. Constitution.) Although the Government asserts that the purpose of the forfeiture is to guarantee that these firearms will not be sold in unregulated channels (Gov't Br. at 33), the forfeiture without the alternative of a bond to ensure the desired licensing shows that the sanction is primarily designed to punish Respondent. See discussion, infra, at 59-60.

> But an action to recover a penalty for an act declared to be a crime is, in its nature, a punitive proceeding, although it takes the form of a civil action; and the word "prosecution" is not inapt to describe such an action.

Id. at 575.29/

Still another case to look beyond the label applied by Congress to the substance of a monetary exaction was United States v. Constantine, 296 U.S. 280 (1935). There, again, an ostensible tax on the sale of liquor was found unconstitutional as a penalty in disguise, which should have fallen with the repeal of the Eighteenth Amendment. The Court noted in its analysis that if the purpose of the statute was "to punish

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29/ LaFranca was decided under a federal statute which only addressed the effect of conviction upon subsequent prosecution. Willis-Campbell Act, c. 134, 42 Stat. 222, 223 (U.S.C. Title 27, §3), quoted at 282 U.S. 571. In a case of acquittal, Coffey would have barred the civil proceeding, given the Court's unequivocal statement that the tax at issue was in reality punishment. Id. at 572. Cf. Gov't Br. at 13.

rather than to tax," then what is "in reality a penalty . . . cannot be converted into a tax by so naming it." Id. at 294.30/

In the instant case as well, the character of forfeiture under 18 U.S.C. § 924(d) as punishment is not diluted by the denomination of the penalty as a forfeiture, or by the provision of civil proceedings for its enforcement.

Helvering v. Mitchell, 303 U.S. 391 (1938), was the watershed case of this era, and it, too, followed the course laid out by Coffey. In that case the Court noted:

> That acquittal on a criminal charge is not a bar to a civil action by the Government, remedial in its nature, arising out of the same facts on which the

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30/ See also Lipke v. Lederer, 259 U.S. 557, 562 (1922)(ostensible tax on liquor "clearly involves the idea of punishment for infraction of the law -- the definite function of a penalty"); Regal Drug Corp. v. Wardell, 260 U.S. 386 (1922) (same).

> criminal proceeding was based has long been settled. . . .
>
> Where the objective of the subsequent action likewise is punishment, [however], the acquittal is a bar, because to entertain the second proceeding for punishment would subject the defendant to double jeopardy; and double jeopardy is precluded by the Fifth Amendment whether the verdict was an acquittal or a conviction.

Id. at 397-98 (emphasis supplied).

Thus, the Double Jeopardy Clause is always applicable if the sanction "was intended as punishment, so that the proceeding is essentially criminal". Helvering v. Mitchell, 391 at 398-99. It is only when the second action is instituted for remedial purposes that the oft-cited statement that "Congress may impose both a criminal and a civil sanction in respect of the same act or omission," id. at 399, becomes

relevant.31/

In United States ex rel. Marcus v. Hess, 312 U.S. 537 (1943), the principle of Coffey was again implicitly reaffirmed through adherence to Helvering's punitive/remedial distinction:

31/ In Helvering v. Mitchell, the sanction at issue was a revenue measure designed to protect the Government's financial interests by providing that a penalty in the amount of 50% of a tax deficiency would be assessed if any part of the deficiency was due to fraud with intent to evade tax. The Court made clear that sanctions imposed to discourage fraudulent attempts to evade the tax "may confessedly be either criminal or civil," 391 U.S. at 399. The Court noted, however, that additions to tax "are provided as a safeguard for the protection of the revenue and to reimburse the Government for the heavy expense of investigation and the loss resulting from the taxpayer's fraud ... 'It must therefore be considered remedial as providing indemnity for loss.'" Id. at 401, quoting, Stockwell v. United States, 80 U.S. (13 Wall.) 531 (1871). This case, by contrast, does not involve the revenue, and Respondent has done nothing to endanger the Government fisc. The Government's interest in this case derives from its police power, and the forfeiture is thus punishment. See discussion, infra, at pp. 52-54.

> Helvering . . . emphasized the line between civil, remedial actions brought primarily to protect the government from financial loss and actions intended to authorize criminal punishment to vindicate public justice. Only the latter subject the defendant to "jeopardy" within the constitutional meaning.

Id. at 548-49. See also Rex Trailer Co. Inc. v. United States, 350 U.S. 148, 150-151 (1956).

This characterization of Helvering, made six years after the case was decided, illustrates the mistake made by the Solicitor General in relying on Helvering for the proposition that the type of procedural rule invoked takes precedence over the classification of the sanction for constitutional analysis. (Gov't Br. at 38-39.)

In Helvering, Justice Brandeis rejected this sort of procedural analysis and announced a new rule to govern the characterization of a penalty:

> The distinction here taken between sanctions that are

> remedial and those that are punitive has not generally been specifically enunciated... the [prior] cases have usually attempted to distinguish between the type of procedural rule involved, rather than the kind of sanction being enforced."

303 U.S. at 400 n.3 (1937) (emphasis supplied). Thus, under Helvering, proceedings for penalties which are "in their nature criminal," (Boyd, 116 U.S. at 634), are precluded by a prior acquittal as attempts to punish a second time, simply by virtue of their nature as punishment. Id. at 399, 405-405.32/ The Government's attempt to resurrect a pre-Helvering analysis should be rejected.

In sum, Respondent's claim and the en banc decision of the Court of

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32/ Punishment is a trigger for many constitutional procedural guarantees, from the Fourth and Fifth Amendment protections against unreasonable search and seizure and against compulsory self-incrimination, Boyd, 116 U.S. at 637, to the locus and magnitude of the burden of proof. Mullaney v. Wilbur, 421 U.S. 684 (1974); In re Winship, 397 U.S. 358 (1969).

Appeals derive sustenance from much more than "a single aged precedent -- Coffey." (Gov't Br. at 11.) The foregoing review illustrates that history is replete with instances of judicial scrutiny of legislative purpose to determine whether legislative enactments are punitive in nature. When the purpose is punishment, the rule of Coffey applies.

Indeed, only the issue of punishment is of sufficient constitutional moment to induce the courts to investigate legislative purpose at all; in other areas, the motives and intentions of Congress invariably are beyond the scope of judicial review. See United States v. O'Brien, 391 U.S. 367, 383 n.30 (1968). The real base of authority for Coffey, then, is thus the historic judicial function to safeguard constitutional rights from the encroachment of Government power.

II. FORFEITURE UNDER 18 U.S.C. § 924(d) IS A PUNITIVE SANCTION DESIGNED TO PUNISH CRIMINAL WRONGDOING.

Given that, under Coffey and its progeny, the Double Jeopardy Clause bars a punitive forfeiture following the owner's criminal acquittal, the task for the Court in this case is to determine whether forfeiture under 18 U.S.C. § 924(d) is a punitive or a remedial sanction. With this the Government agrees (Gov't Br. at 10, 17).

In United States v. Ward, 448 U.S. 242 (1980), this Court prescribed a two-pronged test for distinguishing criminal from civil penalties:

> First, we have set out to determine whether Congress, in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other. . . . Second, where Congress has indicated an intention to establish a civil penalty, we have inquired further whether the statutory scheme was so punitive either in purpose or effect as to negate that intention.

Id. at 248-249 (citations omitted).

The major factors to be evaluated in making such an analysis of

"purpose" and "effect" were first enumerated by this Court in Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1962):

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment -- retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned.

Id. at 168-69 (footnotes omitted).

Applying the Ward analysis to forfeitures of firearms under 18 U.S.C. § 924(d), it appears that Congress's goal in providing for forfeitures along with fines and imprisonment was to deter and punish those who traffick illegally in firearms. Even if Congress did not specifically so intend, however, the purpose and effect of the statute under the Mendoza-Martinez indicia mark this forfeiture sanction as punishment.

A. Congress Intended Forfeiture to be an Additional Penalty for Violation of the Gun Control Act.

The first prong of the Ward test requires an investigation into the express or implied preference of Congress for a criminal or civil label in authorizing a sanction. With respect to 18 U.S.C. § 924(d), the structure of the statute and the legislative history underlying the forfeiture provision reveals that the forfeiture was intended to be punishment for criminal wrongdoing.

It is the structure of 18 U.S.C. § 924 which primarily reveals the intent of Congress to impose forfeiture under this statute as punishment for crime. The statute is entitled "Penalties", and subsections (a) and (b) of the statute specify criminal fines and imprisonment in the respective amounts of up to $5,000 and five years, and $10,000 and ten years. Subsection

(c), which is now known as § 924(d),33/ then authorizes forfeiture as an additional penalty for the illegal use of firearms, whether that use entails sale without a license, or use in a violent crime. See H.R. No. 1577, reported in [1968] U.S. Code Congressional and Administrative News, 4410, 4423.

The statutes at issue in Coffey and Boyd also provided seriatim for imprisonment, fine and forfeiture, and, largely for this reason, this Court unequivocally characterized the forfeitures at issue in those cases as punishment. Coffey, supra, 116 U.S. at 437; Boyd, supra, 116 U.S. at 617. The structure of § 924 likewise reveals that Congress

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33/ The final version of Pub. L. No. 90-618 redesignated former subsection (c) as (d). The new subsection (c) defines the use or possession of a firearm in the commission of a felony as an additional criminal offense and prescribes an additional term of imprisonment of one to ten years (two to twenty-five years for second and subsequent convictions).

intended this forfeiture to be punishment.34/

The legislative explanation of the Gun Control Act also supports the conclusion that § 924 contains an arsenal of "Penalties" to be imposed as punishment for criminal misconduct under the Act. Section 101 of the Gun Control Act (Pub. L. No. 90-618) contains a rare Congressional proclamation as to the purpose of the legislation:

> The Congress hereby declares that the purpose of this title [which amended this chapter] is to provide support to Federal, State, and local

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34/ The fact that forfeitures under 18 U.S.C. § 924(d) are accomplished via civil in rem proceedings is not dispositive of the nature of the penalty that Congress intended to create under this statute. What is important is Congressional intent with respect to the function of the sanction. United States v. LaFranca, 282 U.S. 568, 575 (1930) (the form of a civil action does not change the punitive nature of the penalty); United States v. Chouteau, 102 U.S. 603, 611 (1880) ("The term 'penalty' involves the idea of punishment and its character is not changed by the mode in which it is inflicted.").

> law enforcement officials in their fight against crime and violence, and it is not the purpose of this title to place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, or use of firearms appropriate to . . . any . . . lawful activity.

Pub. L. 90-618, Section 101. See also Cong. Rec., 90th Cong. 2d Sess., July 23, 1968 p. 22773.

The official report of the House of Representatives on the Gun Control Act as a whole also reveals this same broad intent to devise a statute to punish criminals:

> The increasing rate of crime and lawlessness and the growing use of firearms in violent crime clearly attest to a need to strengthen Federal regulation of interstate firearms traffic. . . .
>
> Handguns, rifles, and shotguns have been the chosen means to execute three-quarters of a million people in the United States since 1900. The use of firearms in violent crime continues to increase today. . . . No civilized society can ignore the malignancy which this senseless slaughter reflects.

H.R. No. 1577, 90th Cong. 2d Sess., reported in [1968] U.S. Code

Congressional and Administrative News, 4410, 4412-13.

From this analysis of the punitive purpose of forfeiture under § 924(d), it also follows that insofar as § 924(d) contemplates punishment for crime, it authorizes forfeitures only following conviction. Acquittal constitutes a judicial determination, conclusive and binding, that there was no "violation" of a law specifying a crime upon which to hang a forfeiture of property "used or intended to be used in any violation" of the criminal law.35/

Thus, for the Government now to deprive Respondent of his property, in consequence of a "violation" that has been found to be lacking, not only runs afoul of the Double Jeopardy Clause, because the forfeiture was intended by

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35/ A separate forfeiture proceeding following conviction is not barred

(Footnote continued)

Congress to be punishment, it also is not authorized by the terms of the stat-

(Footnote continued)

by the Double Jeopardy Clause when the forfeiture is authorized as a cumulative penalty, to be imposed in addition to fine and imprisonment. In re Leszynski, 15 Fed. Cas. 397 (Case No. 8,279) (Circuit Court, S.D.N.Y. 1879). Forfeiture as a cumulative penalty also may be imposed following a special verdict by the jury in a criminal proceeding that the property seized was used -- beyond a reasonable doubt -- in the crime charged. See the forfeiture provisions of the Racketeering Influenced and Corrupt Organizations Act of 1961, 18 U.S.C. § 1963, Pub. L. 91-452, 84 Stat. 943, and Federal Rule of Criminal Procedure 31(e).

When the forfeiture is specified by statute as an alternative penalty to imprisonment or fine, however, then the forfeiture is barred equally by acquittal or conviction on the criminal charge; when the Government is offered a choice of penalties, it must be held to that choice, even if the crime which would justify the forfeiture is proved beyond a reasonable doubt in the criminal proceeding. See In re Food Conservation Act, 254 F. 893 (D.C.N.Y. 1918); United States v. One Distillery, 43 F. 846 (D.C. Cal. 1890), aff'd on other grounds, 174 U.S. 149 (1899); United States v. Gates, 25 Fed. Cas. 1263 (No. 15,191) (S.D.N.Y. 1845).

ute, because it is intended to follow conviction.36/

B. The Punitive Purpose and Effect of Forfeiture Under 18 U.S.C. § 924(d) Identify the Penalty as Punishment for Crime.

Prescinding from considerations of express legislative intent, the Mendoza-Martinez factors together provide the clearest proof that the underlying purpose and the effect of forfeitures under 18 U.S.C. § 924(d) is punishment.

36/ Strictly speaking, this construction of 18 U.S.C. §924(d) would obviate the need for this Court to address the constitutional issue presented by this case. However, the question of whether a federal forfeiture statute which exempts those innocent of crime is a criminal or a civil penalty is also raised in another case now before this Court on petition for certiorari. Aponte v. United States, U.S. No. 82-5857, filed, Dec. 7, 1982. In that case, forfeiture was sought following conviction, and the claimant was forced to bear the burden of proof as to the innocence of his property. Amicus represents the Petitioner in that case.

The most salient factor in the Mendoza-Martinez list with respect to this case is whether or not the conduct which justifies the Government in forfeiting Respondent's firearms is itself a crime. In this case, Respondent was charged with, and acquitted of, a criminal violation of the Gun Control Act. The forfeiture at issue here is predicated upon that same alleged, and unproved crime.

Even considered outside its application in this case, Section 924(d) predicates forfeiture only upon a finding of criminal culpability. Section 924(d) authorizes forfeiture only when property is "used or intended to be used in any violation" of the 1968 Gun Control Act. The words "used or intended to be used" here allow the Government to forfeit an entire stock of firearms, even though only a few were ever illegally sold, if the Government can show that the owner intended to sell

the rest illegally as well. The penalty therefore does not reach beyond the realm of criminal misconduct, but is intended to follow in consequence of criminal behavior even in its incipiency.37/

The cases clarify this construction of the statute by emphasizing that forfeiture in the absence of an actual violation, under the "intended use" portion of the statute, requires a manifest intent to violate the law. See United States v. One Assortment of Seven Firearms, 632 F.2d 1276, 1276 (5th Cir. 1980) ("[t]he firearms, to be subject to forfeiture, must be reasonably identified to the [attempted] violation . . . [as] a necessary indicator of intent");

37/ To the extent that anticipated violation qualifies as a criminal attempt, forfeiture of property "intended to be used" in a violation actually will have been used in a violation. See Federal Rule of Criminal Procedure 31(c) (a defendant may be found guilty of a lesser included offense or an attempt to commit the offense or a lesser included offense).

United States v. 1,922 Assorted Firearms and 229,553 Rounds of Assorted Ammunition, 330 F. Supp. 635 (E.D. Mo. 1971) (carelessness, negligence and inadvertence are insufficient to show intended use of firearms in a violation of the Gun Control Act).

Section 924(d) therefore reaches beyond actual violations only to punish provable instances of mens rea.38/ The statute's focus on criminal culpability and moral guilt as justification for the forfeiture thus reveals that forfeiture under § 924(d) is an additional penalty for crime.

The foregoing analysis suggests that, in application, Section 924(d) forfeitures have been construed to re-

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38/ This case is thus unlike One Lot Emerald Stones and One Ring v. United States, 409 U.S. 232, 234 (1972). That case involved a statute which provided that the Government was not required to prove the 'intent' necessary for criminal conviction in order to secure a civil, remedial forfeiture.

quire a 'bad intent' in the commission of a crime. But in fact, the statute by its terms contains an implicit requirement of scienter in justification of forfeiture. The statute provides that "all provisions of the Internal Revenue Code of 1954 relating to the seizure, forfeiture, and disposition of firearms" apply to "forfeitures under the provisions of this chapter." The Internal Revenue Code in turn incorporates the provisions of the customs law with respect to remission and mitigation of forfeiture.39/ See McKeehan v. United States, 438 F.2d 739, 742 n.2 (6th Cir. 1971) (customs law governing remission and mitigation of forfeitures applicable

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39/ Forfeitures of firearms under the Internal Revenue Code are governed by 26 U.S.C. § 5872. Subpart (b) of this statute notes that remission and mitigation of forfeiture is available to the owners of seized property. Subpart (a) of the statute also makes relevant to forfeitures under this statute "all the provi-

(Footnote continued)

to forfeitures under 26 U.S.C. § 5872).

The effect of the customs law remission and mitigation provisions upon the punitive nature of a statutory forfeiture was considered by this Court in United States v. United States Coin and Currency, 401 U.S. 715 (1971) (construing 26 U.S.C. § 7302). In that case, the Court specifically observed that restricting the application of the forfeiture to the guilty -- through the identical incorporation of customs law procedures applicable here -- rendered the forfeiture a punitive sanction:

(Footnote continued)

> sions of internal revenue laws relating to . . . forfeitures of unstamped articles." Sections 7321 through 7328 of Title 26 thus also are relevant to forfeitures under 18 U.S.C. § 924(d), and § 7327 of that Title again provides for remission and mitigation of forfeiture, stating that the applicable provisions of the customs law (19 U.S.C. § 1595 et seq.) shall also govern remission and mitigation of forfeitures under the Internal Revenue Code.

> An express statutory provision permits the innocent owner to prove to the Secretary of the Treasury that the 'forfeiture was incurred without willful negligence or without any intention on the part of the petitioner . . . to violate the law.' . . . It is not to be presumed that the Secretary will not conscientiously fulfill this trust, and the courts have intervened when the innocent petitioner's protests have gone unheeded . . . When the forfeiture statutes are viewed in their entirety, it is manifest that they are intended to impose a penalty only upon those who are significantly involved in a criminal enterprise.

Id. at 721-22 (emphasis supplied).

Given that forfeitures under 18 U.S.C. § 924(d) are subject to remission and mitigation under the very same statutory provisions found to be so relevant in Coin and Currency, it is manifest that they, also, are intended to punish only "those who are significantly involved in criminal enterprise."40/ See McKeehan, supra, at 743-44 (owner devoid

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40/ Compare Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974) (statute authorizing forfeiture did not restrict the penalty to the guilty).

of mens rea was unconstitutionally deprived of firearms under 18 U.S.C. § 924(d) without just compensation).41/ Thus, to the extent that forfeitures under Section § 924(d) are not intended to be visited upon those who are innocent of involvement in the underlying crime, the statute encompasses an implicit requirement of scienter.42/

41/ Accord United States v. One Assortment of Seven Firearms, supra. United States v. 1,922 Assorted Firearms, supra. But see, United States v. 16,179 Moslo Italian .22 Caliber Winler Convertible Starter Guns, 443 F.2d 463, 466 (2d Cir. 1971), cert. den., 404 U.S. 983 (1971) (refusing to find a scienter requirement in the plain words of § 924(d), but not considering the effect of the remission and mitigation provisions).

42/ This scienter requirement is even clearer in 21 U.S.C. § 881(a)(6), which authorizes forfeitures for the illegal use of property in accordance with these same customs statutes, but which also contains an express exculpatory clause for persons innocent of criminal involvement. This statute is the subject of the case Aponte v. United States, 689 F.2d 10 (2d Cir. 1982), now pending before this Court on a Petition for Certiorari. No. 82-5857, filed, Dec. 7, 1982.

The conclusion that forfeitures under § 924(d) punish crime is buttressed by the fact that such forfeitures serve the purposes of retribution and deterrence. That forfeitures under § 924(d) further these purposes is evidenced by the legislative materials discussed above. Moreover, cases like Boyd v. United States, supra, and United States v. United States Coin and Currency, 401 U.S. 71, 718 (1971), illustrate that, as a class, forfeitures occasioned by criminal misconduct further these punitive goals.

In Coin and Currency, this Court expressly noted that "there is no difference . between a man who 'forfeits' $8,674 because of [illegal use] and a man who pays a 'criminal fine' of $8,674 as a result of the same course of conduct". See also One 1938 Plymonth Sedan v. Pennsylvania, 380 U.S. 693, 700 (the object of such a forfeiture, "like a criminal proceeding, is to

penalize for the commission of an offense against the law").

In contrast to punitive forfeitures like that authorized by § 924(d), remedial, civil sanctions function as compensatory measures. For example, in Helvering v. Mitchell, 303 U.S. 391, 401 (1937), the Court held that a penalty of 50% of a tax deficiency was remedial because it was intended as government compensation and "as a safeguard for the protection of the revenue." Similarly, in One Lot Stones, supra, 409 U.S. at 236, the forfeiture involved was not conditioned upon a crime, and was intended to be a remedial measure to safeguard the government fisc.43/ Moreover, the Court in

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43/ See also, United States v. Ward, 448 U.S. 242, 254 (1980) (distinguishing forfeitures predicated upon crimes from penalties "analogous to traditional civil damages"); Rex Trailer Co., Inc. v. United States, 350 U.S. 148, 153 (1956) (provision for fine "comparable to the recovery under

(Footnote continued)

One Lot Stones specifically distinguished remedial statutes from statutes which provide for "forfeiture of a man's property by reason of offenses committed by him." Id.

Forfeitures of firearms under 18 U.S.C. § 924(d) are not remedial as reimbursement or compensation to the government.44/ Furthermore, the struc-

(Footnote continued)

liquidated damages provisions which fix compensation for anticipated loss"); United States ex rel. Marcus v. Hess, 317 U.S. 537, 549 (1943) (fine prescribed "will no more than afford the government complete indemnity for the injuries done it"); Stone v. United States, 167 U.S. 178, 188 (1897)(the Government here "only seeks in its capacity as owner of property, illegally converted, to recover its value").

44/ This Court observed in United States v. Ward, 448 U.S. 242, 254 (1980) that the forfeiture in Boyd v. United States, 116 U.S. 616 (1885), which was occasioned only by reason of offense against the criminal law was "a penalty that had absolutely no correlation to any damages sustained by society or to the cost of enforcing the law." Forfeiture under § 924(d) likewise is predicated solely upon criminal wrongdoing and, unlike the statute at issue in Ward, it has no remedial function.

ture of the statute, providing sequentially for imprisonment, fine and forfeiture, illustrates that the forfeiture of firearms as a result of their alleged illegal use is actually a measure directed against the owner to punish him for the underlying crime and to deter him from future such conduct.

Forfeiture under § 924 is not only designed to punish, it also operates as punishment, because it is an "affirmative disability or restraint." The Supreme Court in Mendoza-Martinez cited three cases for the proposition that the imposition of an "affirmative disability or restraint" is characteristic of a criminal penalty. 372 U.S. at 168. Taken together, these cases establish that an affirmative disability or restraint is a detriment which is effected by positive governmental action taken in order to deprive the individual

of property or liberty.45/

With respect to forfeiture under 18 U.S.C. § 924(d), the seizure and condemnation of a man's property because the property is involved in the illegal conduct of its owner undoubtedly constitutes direct and affirmative action taken by the Government against the guilty person for the purpose of punishing that person. Such forfeiture is not merely the denial of a benefit allocated according to governmental discretion; rather, it is a physical taking of

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45/ Flemming v. Nestor, 363 U.S. 603, 617 (1960) (statutory termination of social security benefits not punitive and not a deprivation of accrued property rights); United States v. Lovett, 328 U.S. 303, 315 (1945) (statute denying payment of earned salary to three named government employees was punishment); Ex parte Garland, 4 Wall. (71 U.S.) 333, 377 (1867) (oath required of attorneys seeking to practice before the federal courts was punishment). Cf., Helvering v. Mitchell, 303 U.S. 391, 399 (1938) ("One [remedial sanction] which is characteristically free of the punitive criminal element is the revocation of a privilege voluntarily granted").

property belonging to the claimant. This is precisely the meaning of "affirmative disability."

Moreover, forfeitures historically have been regarded as punishment. The law of forfeiture has dual historical roots, which predicate forfeiture upon differing theories of guilt, but which both link the sanction of forfeiture to the goal of punishment for wrongdoing.

The historical criminal basis for forfeiture was the idea that rights to property accrue to individuals only through the covenants of society, as embodied in the laws of the state. Violation of those laws effectively repudiates the social contract which enables the individual to own property, and so the property may be forfeited. 1 W. Blackstone, Commentaries.46/

46/ Thus, under English common law, an in personam forfeiture proceeding

(Footnote continued)

The alternate root for the forfeiture sanction is the archaic doctrine of deodands. Under that ancient and superstitious theory, instruments of harm were themselves considered wrongdoers. The idea of retribution suffuses this fiction, however, because the purpose of the ascription of guilt was to wreak vengeance upon the thing, as if it were sentient and could appreciate punishment. O. Holmes, The Common Law, Lecture 1 at 10, 34 (1881).47/

(Footnote continued)

could be used to effect forfeiture of a felon's real and personal property once the offender was convicted. See The Palmyra, 12 Wheat. (25 U.S.) 1, 14 (1827).

47/ Although the doctrine of deodands has been soundly, and rightfully, denounced on many occasions, it still sometimes confuses the issue of punishment in the context of in rem forfeitures. Compare the following cases: Boyd, supra, 116 U.S. at 637 (rejecting the legal fiction and recognizing that forfeitures of property for offenses against the law are really punishments directed against the owners); Various Items

(Footnote continued)

Finally, there is no remedial purpose alternatively assignable to forfeitures under 18 U.S.C. § 924(d). The Government is incorrect in asserting that forfeitures of firearms have a non-punitive purpose, viz., the prevention of illegal commerce in guns. (Gov't Br. at 33.)

First, this is not a case where the forfeiture is preventative because it removes contraband from circulation. Simple ownership of registered guns is not illegal, nor is sale under proper

(Footnote continued)

of Personal Property v. United States, 282 U.S. 577, 581 (1931) (resorting to the legal fiction that property can be "held guilty and condemned as though it were conscious instead of inanimate and insentient"); United States v. United States Coin and Currency, 401 U.S. 715, 720-21 (1971) (noting Blackstone's observation that the legal fiction of the animation of property is "based upon a 'superstition' inherited from the 'blind days' of feudalism."); Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 683 (1974) (construing a statutory forfeiture as directed against the thing as offender).

license. Forfeiture under § 924(d) is directed uniquely against guns that are sold illegally. This goal of "prevention" thus assumes that Respondent will sell his firearms illegally in the future and imputes to Respondent the moral guilt and knowing intent which is the basic foundation for all justifications of punishment.48/

Consequently, this sort of "prevention" is not an "alternative" purpose to punishment, because such prevention is no more than "incapacitation" with respect to future criminal conduct. Such incapacitation is an acknowledged rationale for criminal punishment.49/ As this Court noted in its construction of the Gun Control Act in Huddleston v. United States, 415 U.S. 814 (1979),

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48/ See H.L.A. Hart, Punishment and Responsibility (1968), especially the included essay, Intention and Punishment, at pp. 113-135.

49/ H. L. Packer, The Limits of Criminal Sanction (1968) pp. 48-53.

Congress achieved its purpose to deprive individuals of firearms "whose possession of them would be contrary to the public interest" (id. at 825) by the instrument of "criminal statutes." Id. at 831.

Second, whatever the character of this purported purpose, forfeiture without just compensation, or without alternatives, such as the option to post a bond conditioned against illegal use, 50/ is not consistent with an intent to "regulate" rather than punish. At the very least, the sanction is excessive if justified on the basis of "prevention" rather than punishment. The last of the Mendoza-Martinez factors thus indicate that there really is no distinct alternative purpose to punishment assignable to forfeiture under 18 U.S.C. § 924(d), and that, in any event,

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50/ Cf. Murphy v. United States, 272 U.S. 630, 632 (1926) (preventative goal evidenced by alternative of a bond).

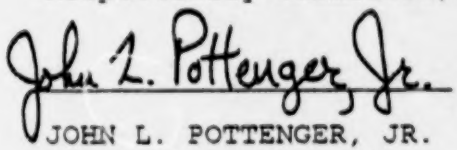
the penalty is excessive in relation to the proposed alternative function of prevention. All of the Mendoza-Martinez factors thus point to the punitive purpose and effect of forfeiture under 18 U.S.C. § 924(d).

In sum, this Court's method of statutory construction for characterizing a sanction as punitive or remedial reveals that a forefeiture of firearms under the Gun Control Act is punishment for criminal wrongdoing. Consequently, the Double Jeopardy Clause forbids the Government to take a second shot at punishing Respondent via forfeiture after he has been acquitted on the underlying criminal charges.

CONCLUSION

The judgment of the en banc court of appeals should be affirmed.

Respectfully submitted,



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No. 82-1047-CFX
Status: GRANTED

Title: United States, Petitioner
v.
One Assortment of 89 Firearms

Docketed:
December 20, 1982

Court: United States Court of Appeals
for the Fourth Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Louthian, Herbert W.

Entry	Date	Note	Proceedings and Orders
1	Nov 10 1982		Application for extension of time to file petition and order granting same until December 21, 1982 (Chief Justice, November 12, 1982).
2	Dec 20 1982	G	Petition for writ of certiorari filed.
4	Jan 17 1983		Order extending time to file response to petition until February 4, 1983.
5	Feb 2 1983		Brief of respondent One Assortment of 89 Firearms in opposition filed.
6	Feb 2 1983		DISTRIBUTED. February 18, 1983
7	Feb 14 1983	X	Reply brief of petitioner filed.
8	Feb 22 1983		Petition GRANTED.
			**********
9	Mar 29 1983		Record filed.
10	Mar 29 1983		Certified original record & C.A. proceedings, 4 volumes received.
12	Apr 8 1983		Order extending time to file brief of petitioner on the merits until May 9, 1983.
13	Apr 15 1983		Joint appendix filed.
14	May 10 1983		Order further extending time to file brief of petitioner on the merits until June 8, 1983.
15	Jun 11 1983		Brief of petitioner filed.
17	Jul 11 1983		Order extending time to file brief of respondent on the merits until August 31, 1983.
18	Aug 31 1983		Brief of respondent One Assortment of 89 Firearms filed.
19	Aug 31 1983		Brief amicus curiae of Jerome N. Frank Legal Services filed.
20	Sep 21 1983		CIRCULATED.
21	Sep 26 1983	D	Motion of Jerome N. Frank Legal Services Organization for leave to participate in oral argument as amicus curiae and for divided argument filed.
23	Oct 11 1983		Motion of Jerome N. Frank Legal Services Organization for leave to participate in oral argument as amicus curiae and for divided argument DENIED.
24	Oct 24 1983		SET FOR ARGUMENT. Wednesday, November 30, 1983. (4th case) (1 hour)
25	Nov 15 1983	X	Reply brief of petitioner United States filed.
26	Nov 30 1983		ARGUED.